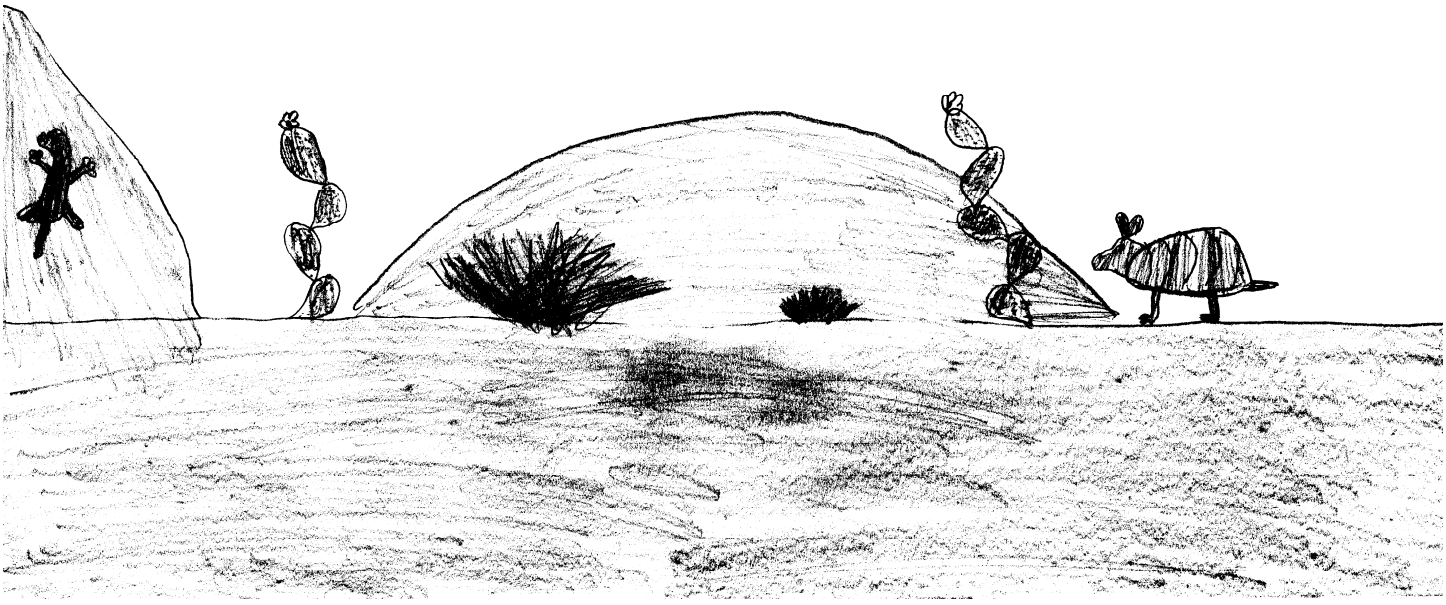
TEXAS REGISTER

Volume 33 Number 52 ***December 26, 2008*** ***Pages 10387 - 10560***

Kylee Robinson
3rd Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

IN THIS ISSUE

IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

...

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0767-GA

Requestor:

The Honorable Mike Jackson

Chair, Committee on Nominations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Whether an attorney who acts as an unpaid advisor to the board of trustees of an independent school district may also represent the district for compensation in the collection of delinquent taxes (RQ-0767-GA)

Briefs requested by January 12, 2009

RQ-0768-GA

Requestor:

Mr. Robert L. Bacon

Interim Banking Commissioner

Texas Department of Banking

2601 North Lamar Boulevard

Austin, Texas 78705

Re: Whether an agent under a statutory durable power of attorney may alter the method of disposition of a body previously specified by the purchaser of a prepaid funeral contract (RQ-0768-GA)

Briefs requested by January 12, 2009

RQ-0769-GA

Requestor:

The Honorable Homero Ramirez

Webb County Attorney

Office of the County Attorney

1110 Washington Street, Suite 301

Laredo, Texas 78040

Re: Authority of a state agency or institution of higher education to employ and compensate a registered lobbyist (RQ-0769-GA)

Briefs requested by January 16, 2009

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200806540
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 17, 2008

♦ ♦ ♦

Opinion

Opinion No. GA-0686

The Honorable Susan Combs

Texas Comptroller of Public Accounts

Post Office Box 13528

Austin, Texas 78711-3528

Re: Whether the Comptroller's report required by Tax Code sections 313.008 and 313.032 must be limited to the items listed therein and exclude information that is marked as "confidential" (RQ-0727-GA)

S U M M A R Y

In preparing the report on limitation agreements under the Texas Economic Development Act, the Comptroller of Public Accounts may include more information than is required by sections 313.008 and 313.032 of the Tax Code if the information is reasonably necessary to assess the progress of such agreements.

The Comptroller may use in the report information provided by recipients of limitations, regardless of whether the information is marked as confidential by the recipients, so long as the information is not confidential by law. The Comptroller must, in the first instance, determine whether information is confidential by law.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200806541
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 17, 2008

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 307. INSPECTIONS OF HOMES IN AREAS WITHOUT MUNICIPAL INSPECTIONS

10 TAC §307.3

The Texas Residential Construction Commission (commission) proposes to amend 10 TAC §307.3, concerning qualified fee inspectors. Due to relationships of consanguinity (kinship), affinity (marriage), and business affiliations, a builder/remodeler's interests may be adverse to or in conflict with a fee inspector's professional responsibility to conduct a thorough inspection of residential construction and review of construction practices.

In accordance with Property Code §446.004 and §307.3, fee inspectors may include a professional engineer licensed by the Texas Board of Engineering, an architect registered with the Texas Board of Architectural Examiners, a professional inspector licensed by the Texas Real Estate Commission, or a third-party inspector registered with the commission. To varying degrees, these professionals are required to maintain certain levels of ethical business practice and to make known to their clients conflicts or potential conflicts of interest.

The proposed amendment to §307.3 does not lessen the ethical consideration or professional standards required by 22 TAC Chapter 137 applicable to licensed engineers, by 22 TAC §1.145 applicable to registered architects, or by 22 TAC §535.220 applicable to licensed real estate inspectors. Instead, when conducting residential construction inspections as a fee inspector, these professionals are still held to their required professional standards.

The proposed amendment establishes whether a relationship creates a conflict of interest. The proposed amendment eliminates from eligibility as a fee inspector those persons who reside in the same household as the builder/remodeler or builder/remodeler's spouse, are related to the builder/remodeler or builder/remodeler's spouse within the fourth degree by consanguinity or affinity, or who have a fiduciary or ownership interest in each other's businesses or their spouse's business. The proposed amendment establishes the framework for determining conflicts of interest due to relationships of consanguinity, affinity, and affiliate businesses. However, the proposed amendment is not exhaustive and obligates the builder/remodeler and inspector to determine whether factors other than those expressly enumerated in the proposed amendment or whether any additional relationship creates a conflict of interest or the appearance of impropriety.

The proposed amendment will aid the commission in administration of the fee inspection program. The proposed amendment will promote inspections conducted by an unbiased inspector and will cultivate stakeholders' confidence in the residential dwelling inspection outcome. It is in the public interest that a fee inspector conduct an inspection upon which the builder/remodeler and homeowner may rely. The proposed amendment advances this public interest by requiring the builder/remodeler to fulfill his obligations under Chapter 307 using a fee inspector who has no conflict of interest with the builder/remodeler of the home. Most builder/remodelers already recognize that it is in their interest, in the interest of the homeowner, and in the public interest that the inspections required under Chapter 307 be conducted by a fee inspector without a conflict of interest. Most fee inspectors also recognize that, to remain in good standing as a professional, it is necessary to conduct business in a manner that is above reproach.

The proposed amendment implements new legislation enacted during the 80th Legislative Session, Regular Session, House Bill 1038 (Act effective September 1, 2008, 80th Legislature, Regular Session), which includes changes to Title 16, Property Code. More specifically, the amendment is proposed under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code and under chapter 446 of the Property Code, which requires inspection of residential construction that is located in unincorporated areas and areas not otherwise subject to municipal inspections.

Ms. Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amendment is in effect there will be no increased expenditures or revenue for state government and no fiscal impact or implications for state or local government as a result of enforcing or administering the amendment.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendment is in effect, the public will benefit from having residences built to the current codes and standards of the state. The public will also benefit from inspections that are conducted by unbiased fee inspectors who do not have conflicts of interest with the builder/remodeler of the residence. There is no anticipated economic cost to small businesses or persons who are required to comply with the proposed amendment.

Ms. Durso has also determined that for each year of the first five-year period the amendment is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the amendment is in effect there may be an adverse economic effect on small businesses that build in areas not subject to municipal inspection due to the expense of the required inspections during construction. However, the proposed amendment clarifies which inspectors may be precluded from conducting inspections of particular homes due to a relationship between the builder/remodeler and inspector that creates a conflict of interest. The amendment is proposed to implement a statutory requirement that a builder/remodeler in those areas not subject to municipal inspection obtain interim construction inspections as required by statute. Accordingly, no regulatory flexibility analysis is necessary.

Comments on the proposed amendment may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Section 307.3 Amendment" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed amendment in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration. Comments submitted after the deadline, submitted to a different address, or submitted electronically without "Section 307.3 Amendment" in the subject line may not be accepted.

The amendment is proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code; Property Code §446.001, which gives the commission the authority to inspect homes in unincorporated areas; the commission's enabling act; and the Administrative Procedure Act, Texas Government Code, Chapter 2001.

No other statutes, articles, or codes are affected by the proposed amendment.

§307.3. Qualified Fee Inspectors.

(a) - (b) (No change.)

(c) A builder/remodeler may not engage a fee inspector if:

(1) the fee inspector or fee inspector's spouse is related to the builder/remodeler or the builder/remodeler's spouse within the fourth degree of consanguinity or affinity, as determined by the following chart:

Figure: 10 TAC §307.3(c)(1)

(2) the builder/remodeler or builder/remodeler's spouse reside in the same household as the fee inspector or fee inspector's spouse;

(3) the builder/remodeler or builder/remodeler's spouse, directly or indirectly, owns or controls any interest ownership in the business or businesses of the fee inspector or fee inspector's spouse;

(4) the fee inspector or fee inspector's spouse, directly or indirectly, owns or controls any interest ownership in the business or businesses of the builder/remodeler's spouse;

(5) the builder/remodeler or builder/remodeler's spouse is a director or office holder of any business of the fee inspector or fee inspector's business;

(6) the fee inspector or fee inspector's spouse is a director or office holder of any business of the builder/remodeler or builder/remodeler's spouse;

(7) if there is any reciprocity of services between the builder/remodeler, builder/remodeler's spouse, fee inspector, or fee inspector's spouse; or

(8) there is an relationship between the builder/remodeler, builder/remodeler's spouse, fee inspector, or fee inspector's spouse, directly or indirectly, that creates any conflict of interest or the appearance of impropriety.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806462
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 463-3926

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER A. PROCUREMENT

16 TAC §§401.101 - 401.103

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Lottery Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Lottery Commission (Commission) proposes the repeal of 16 TAC §401.101 (relating to Lottery Procurement Procedures), §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation), and §401.103 (relating to Protests of Contract Award). The repeals are proposed concurrently with proposed new 16 TAC §401.101 (relating to Lottery Procurement Procedures), §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation), and §401.103 (relating to Protests of Contract Award).

The purpose of the proposed repeal of §401.101, Lottery Procurement Procedures, and the proposed new §401.101, Lottery Procurement Procedures, is to provide for a Best and Final Offer process; to provide for the selection of several top proposers found to be in a competitive range; to clarify that the agency has the discretion of negotiating with the proposers in the competitive range simultaneously, or in order, beginning at the highest ranked proposer; to provide a definition for "proprietary product" and to establish the process to be used in the purchase of a proprietary product; to make the definition of "principal place of business" generally conform with the judicially determined meaning of the term; to include "statewide contract" in the definition of "state contract"; to include "printing services" in the methods of procurement intended to be used by the agency; to authorize the agency to seek the assistance of the Comptroller of Public

Accounts; to standardize the Request for Proposal (RFP) and the RFP evaluation process; to generally clarify the purchasing process and conform the rules to the process currently followed by the agency; and to conform the purchasing process to the statutes that apply to the Texas Lottery Commission.

The purpose of the proposed repeal of §401.102, Protests of the Terms of a Formal Competitive Solicitation, and the proposed new §401.102, Protests of the Terms of a Formal Competitive Solicitation, is to provide for a timely, efficient, and effective protest procedure to published solicitations; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests to the Commissioners of the Texas Lottery Commission; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

The purpose of the proposed repeal of §401.103, Protests of Contract Award, and the proposed new §401.103, Protests of Contract Award, is to provide for a timely, efficient, and effective protest procedure to contract awards; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests to the Commissioners of the Texas Lottery Commission; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed repeals will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed repeals. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the repeals as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed repeals will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Mike Fernandez, Director of Administration, has determined that for each year of the first five years the proposed repeal of §401.101 will be in effect, there will be no impact on the public benefit as a result of the repeal because a new rule is being proposed concurrently. The anticipated public benefit of the proposed new rule will be that it promotes increased competition among vendors; a better understanding of requirements for responses to requests for bids and proposals for the vendor community; and conforms the agency rules to the statutory requirements and agency practices.

Mr. Fernandez, has also determined that for each year of the first five years the proposed repeal of §401.102 will be in effect, there will be no impact on the public benefit as a result of the repeal because a new rule is being proposed concurrently. The anticipated public benefit of the proposed new rule will be that the rule provides ease and efficiency to the vendor community to protest the agency's solicitation of bids or proposals; and will conform the agency rules to the statutory requirements and agency practices.

Finally, Mr. Fernandez has determined that for each year of the first five years the proposed repeal of §401.103 will be in effect, there will be no impact on the public benefit as a result of the repeal because a new rule is being proposed concurrently. The anticipated public benefit of the proposed new rule will be that the rule provides ease and efficiency to the vendor community to protest the agency's award of contracts; and will conform the agency rules to the statutory requirements and agency practices.

The Commission requests comments on the proposed repeals from any interested person. Comments on the proposed repeals may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at www.legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The repeals are proposed under Texas Government Code, §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The repeals are also proposed under Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

Texas Government Code, Chapter 466, is affected by this proposal.

§401.101. Lottery Procurement Procedures.

§401.102. Protests of the Terms of a Formal Competitive Solicitation.

§401.103. Protests of Contract Award.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806506
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §401.101

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.101 (relating to Lottery Procurement Procedures). The new rule is proposed concurrently with the proposed repeal of 16 TAC §401.101 (relating to Lottery Procurement Procedures).

The purpose of the proposed new rule is to provide purchasing procedures for purchases in support of the administration of the state lottery; and to provide for a Best and Final Offer process; to provide for the selection of several top proposers found to be in a competitive range; to clarify that the agency has the discretion of negotiating with the proposers in the competitive range simultaneously, or in sequence, beginning at the highest ranked proposer; to provide a definition for "proprietary product" and to establish the process to be used in the purchase of a proprietary product; to make the definition of "principal place of business" generally conform with the judicially determined meaning of the term; to include "statewide contract" in the definition of "state contract"; to provide that "printing services" will be purchased in

accordance with the procurement procedures authorized by this rule; to standardize the Request for Proposal (RFP) and the RFP evaluation process; to generally clarify the purchasing process and conform the rules to the process currently followed by the agency; and to conform the purchasing process to the statutes that apply to the Texas Lottery Commission.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Mike Fernandez, Director of Administration, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated will be that the rule promotes increased competition among vendors; a better understanding of requirements for responses to requests for bids and proposals for the vendor community; and conforms the agency rules to the statutory requirements and agency practices.

The Commission requests comments on the new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at www.legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal implements Texas Government Code, Chapter 466.

§401.101. Lottery Procurement Procedures.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The State Lottery Act.

(2) Agency--For the purposes of these rules dealing with procurements for the administration of the lottery, the term "agency" refers to the commission as defined in paragraph (5) of this subsection.

(3) Best and Final Offer (BAFO)--A revised final bid or proposal submitted after all clarifications, discussions, and negotiations with the agency.

(4) Executive director--The executive director of the Commission.

(5) Commission--The state agency established under Chapter 466 and Chapter 467, Government Code. However, these rules apply only to the procurement of goods and services for the administration of the lottery authorized by the State Lottery Act. For the sake of clarity, these procurement rules will refer to the commission as "agency" and to the appointed board as the "Texas Lottery Commission".

(6) Cost--The price at which the agency can purchase goods and/or services.

(7) Electronic State Business Daily or Business Daily--The website administered by the Comptroller of Public Accounts, or its successor, on which procurement opportunities are advertised in electronic format.

(8) Emergency--Unforeseeable circumstances that may require an immediate response to avert an actual or potential public threat, or serious operational or financial loss to the agency, and in which compliance with normal procurement practice is impracticable or contrary to the public interest.

(9) Emergency purchase--Immediate procurements to meet an emergency.

(10) Goods--Supplies, materials, and equipment.

(11) IFB--A written invitation for bids.

(12) Lottery--The procedures and operations of the Texas Lottery Commission under the State Lottery Act through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.

(13) Nonresident bidder or proposer--"Nonresident bidder or proposer" refers to a person who is not a "resident bidder or proposer".

(14) Principal place of business--The state in which the head office of a business is located; generally, where the executive management is located and the business records are maintained.

(15) Produced in Texas--Those goods that are manufactured in Texas, excluding the sole process of packaging or repackaging. Packaging or repackaging does not constitute being manufactured in Texas.

(16) Proprietary product--A product or service that is unique to a single vendor and is not available from other sources.

(17) Resident bidder or proposer--"Resident bidder or proposer" refers to a person whose principal place of business is in this state, including a contractor whose ultimate parent company or majority owner has its principal place of business in this state.

(18) RFP--A written request for proposals.

(19) RFQ--A written request for qualifications.

(20) Services--Fungible services, specialized services, or unique services, including, by way or example, but not limitation: facility services (i.e., the lease of real property, including utility and custodial service), telecommunications services, advertising services, consultant services, personal services and professional services.

(21) State or statewide contract--A contract for goods or services established and administered by another state agency (e.g., Texas Comptroller of Public Accounts, Texas Department of Information Resources) for use by all state agencies.

(22) Texas Lottery Commission--The appointive board or commission established in Chapter 467, Government Code.

(b) Use and Effect of Rules. These rules are prescribed for the performance of the statutory powers and functions vested in the Commission. In no event shall they, or any of them, be construed as a

limitation or restriction upon the exercise of any discretion authorized to be exercised by the Commission.

(c) Procurement method.

(1) For the purchase or lease of goods and services not expected to exceed $5,000, or for the purchase or lease of goods and services available under a state contract, a competitive solicitation, whether formal or informal, may be conducted, but is not required.

(2) For the purchase or lease of goods and services not expected to exceed $25,000, the agency, at a minimum, will conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids.

(3) For the purchase or lease of goods and services expected to exceed $25,000, the agency will conduct a formal competitive solicitation in an attempt to obtain at least three competitive bids or proposals.

(4) Printing services. For the purchase of printing services, the agency will follow the appropriate procurement method outlined in paragraphs (1) - (3) of this subsection.

(5) Emergency purchase. Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make an emergency purchase or lease of goods or services. Prior to making an emergency purchase or lease of goods or services, the existence of an emergency should be documented. For emergency purchases in excess of $25,000, the agency may conduct an informal competitive solicitation in an attempt to obtain at least three competitive bids. In response to an emergency, the agency may procure goods or services in the most expeditious manner deemed appropriate, including from a sole source. Whenever possible, contacts will be made with multiple sources in order to receive as much competitive benefit as possible.

(6) Proprietary purchase. When the agency believes that goods or services are proprietary to one vendor or one manufacturer, a written proprietary purchase justification will be included in the procurement file. If the estimated purchase price exceeds $25,000 for commodities or $100,000 for services, the procurement will be posted on the Electronic State Business Daily prior to a purchase order or contract being issued.

(7) Notwithstanding paragraphs (1) - (4) of this subsection, the agency may make a purchase or lease of goods or services under any other procedure not otherwise prohibited by law.

(d) Informal competitive solicitations.

(1) An informal competitive solicitation is a process conducted in an effort to receive at least three competitive bids for a specifically identified good or service, without the advertisement and issuance of an IFB or RFP. The bids may be solicited by letter, electronic mail, facsimile, or telephone call. The following information will be recorded by the agency in the solicitation file:

(A) the name and telephone number of each person or company to which the solicitation was provided;

(B) the name and telephone number of the person or company submitting the price bid;

(C) the date the bid was received;

(D) the amount of the bid;

(E) bidder's HUB status; and

(F) the name and telephone number of the person receiving the bid for the agency.

(2) The agency will award a contract to the qualified bidder submitting the lowest and best bid, except that the agency may reject all bids if it is determined to be in the best interest of the state.

(3) The contract will be awarded by the issuance of a written purchase order.

(e) Formal competitive solicitations.

(1) A formal competitive solicitation is a process conducted in order to receive at least three sealed competitive bids or proposals pursuant to the issuance of an IFB, RFP, or RFQ respectively.

(A) An IFB will be used when the agency is able to describe, by way of established specifications, exactly what it wishes to procure, and wants bidders to offer such at a specific price.

(B) An RFP will be used when the agency knows generally what it wishes to procure in order to accomplish a certain goal(s) or objective(s); requirements cannot be completely and accurately described; requirements can be satisfied in a number of ways, all of which could be acceptable; or, where oral or written communications with proposers may be necessary in order to effectively communicate requirements and/or assess proposals, and the agency wants proposers to offer a solution(s) to address such need(s) at a specific price(s).

(C) An RFQ will be used when the agency wants to procure professional services and evaluate proposers solely on their qualifications.

(2) Where time and circumstances permit, the agency will advertise formal competitive solicitations, whether by IFB, RFP, or RFQ on the Electronic State Business Daily. The agency may advertise such solicitations in other media determined appropriate by the agency.

(3) For all formal competitive solicitations, the agency will award a contract to the most qualified bidder or proposer as determined during the evaluation of the proposals. The agency may reject all bids if it is determined to be in the best interest of the lottery. At the time a purchase order is issued or a contract is executed, the agency will notify, in writing, all other bidders of the contract award by facsimile, or by certified mail, return receipt requested, or by overnight mail. Any information relating to the solicitation not made privileged from disclosure by law will be made available for public disclosure, after award of a contract, pursuant to the Texas Public Information Act.

(4) For those formal competitive solicitations where less than three bids or proposals are received, the agency will document the reasons, if known, for the lack of three bids or proposals. If less than three bids or proposals are received, the agency may cancel the solicitation and conduct another solicitation, or it may award a contract if one acceptable bid or proposal is received.

(5) For formal competitive solicitations where an IFB is used, the agency will award a contract to the qualified bidder submitting the lowest and best value, as determined during the evaluation of the bids.

(f) RFP.

(1) Submission. When an RFP is used by the agency, the RFP will contain, at a minimum, the following:

(A) a general description of the goods and/or services to be provided, and a specific identification of the goals or objectives to be achieved;

(B) a description of the format proposals must follow and the elements they must contain;

(C) the time and date proposals are due, and the location and person to whom they are to be submitted;

(D) an identification of the process to be utilized in evaluating proposals; and

(E) a listing of the factors to be utilized in evaluating proposals and awarding a contract. At a minimum, the factors should include:

(i) the proposer's price to provide the goods or services;

(ii) the probable quality of the offered goods or services;

(iii) The agency's evaluation of the likelihood of the proposal to produce the desired outcome for the agency, considering, among other criteria:

(I) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;

(II) the qualifications of the proposer's personnel;

(III) the experience of the proposer in providing the requested goods or services;

(IV) the financial status of the proposer; and

(iv) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

(2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals, develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee in evaluating the proposals. All proposals that are responsive to the RFP will be reviewed by the evaluation committee. As part of the initial evaluation process, proposers may be requested to make an oral presentation to the committee, which may include an inspection trip to the proposer's facilities. The evaluation committee may seek advice from consultants. If consultants are employed, they may be provided all information provided by the proposers. The evaluation committee will evaluate and rank all proposals in accordance with the evaluation criteria.

(3) Best and Final Offers (BAFO). The agency may select top proposers, which may each be given an opportunity to discuss, clarify, and negotiate with the agency, and submit revisions to their respective proposals to the agency through a BAFO process. During discussions between the proposers and the agency, no information from a competing proposal may be revealed by the agency to another competitor. Any type of auction practice or allowing the transfer of technical information is specifically prohibited. At the conclusion of the discussions, BAFOs may be formally requested from the proposers and a deadline will be set for submission. BAFOs will be submitted by supplemental pages and not a complete resubmission of the proposal. All BAFOs will be reviewed by the evaluation committee. The evaluation committee will evaluate and rank the BAFO response together with the original proposal in accordance with the evaluation criteria.

(4) Negotiation. If a BAFO process is not used, the agency will attempt to negotiate a contract with the selected proposer. If a contract cannot be negotiated with the selected proposer on terms the agency determines reasonable, negotiations with that proposer will be terminated, and negotiations will be undertaken with the next highest ranked proposer. This process will be continued until a contract is executed by a proposer and the agency, or negotiations are terminated. If no contract is executed, the agency may attempt to negotiate a contract with any of the other proposers or cancel the solicitation. Negotiations will continue until a contract is executed or all proposals are rejected, or the solicitation is canceled.

(g) RFQ.

(1) Submission. When an RFQ is used by the agency, the RFQ will contain, at a minimum, the following:

(A) a general description of the professional services to be performed, and a specific identification of the goals or objectives to be achieved;

(B) a description of the format proposals must follow and the elements they must contain;

(C) the time and date proposals are due, and the location and person to whom they are to be submitted;

(D) an identification of the process to be utilized in evaluating proposals and awarding a contract; and

(E) a listing of the factors to be utilized in evaluating proposals and awarding a contract. At a minimum, the factors should include:

(i) the demonstrated competence and qualifications to perform the services;

(ii) the quality of the proposer's past performance in contracting with the agency, with other state entities, or with private sector entities;

(iii) the financial status of the proposer;

(iv) the qualifications of the proposer's personnel;

(v) the experience of the proposer in providing the requested services; and

(vi) whether the proposer performed the good faith effort required by the HUB subcontracting plan, when the agency has determined that subcontracting is probable.

(2) Evaluation Process. The agency will, prior to the deadline for receipt of proposals, develop and establish comprehensive evaluation criteria to be utilized by an evaluation committee in evaluating the proposals. All proposals that are responsive to the RFQ will be reviewed by the evaluation committee. The evaluation committee will evaluate and rank all proposals in accordance with the evaluation criteria.

(3) Negotiation. The agency will then attempt to negotiate a contract, for a fair and reasonable price, with the selected proposer or the agency may engage in simultaneous negotiations with multiple proposers. If a contract cannot be negotiated with the selected proposer on terms the agency determines reasonable, negotiations with that proposer will be terminated, and negotiations will be undertaken with the next highest ranked proposer. This process will continue until a contract is executed by a proposer and the agency, or negotiations are terminated. If no contract is executed, the agency may attempt to negotiate a contract with any of the other proposers. Negotiations will continue until a contract is executed or all proposals are rejected.

(h) Preferences.

(1) If, after application of the preferences required by Texas law, a tie continues, the contract award will be made by the drawing of lots.

(2) A bidder or proposer entitled to a preference(s) under Texas law shall claim the preference(s) in its bid or proposal.

(i) Contract terms. A contract for the purchase or lease of goods or services relating to the implementation, operation, or admin-

istration of the lottery will provide that the executive director may terminate the contract, without penalty, if an investigation made pursuant to the Act reveals that the person to whom the contract was awarded would not be eligible to receive a sales agent license under the State Lottery Act, Government Code, §466.155. An IFB, RFP or RFQ may require that bidders or proposers provide in their bids or proposals sufficient information to allow the agency to determine whether the bidder or proposer meets the eligibility requirements for a sales agent license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806509
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §401.102

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation). The new rule is proposed concurrently with the proposed repeal of 16 TAC §401.102 (relating to Protests of the Terms of a Formal Competitive Solicitation).

The purpose of the proposed new rule is to provide for a timely, efficient, and effective protest procedure to published solicitations; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests to the Commissioners of the Texas Lottery Commission; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Mike Fernandez, Director of Administration, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated will be that the rule provides ease and efficiency to the vendor community to protest the agency's solicitation of bids or proposals; and will conform the agency rules to the statutory requirements and agency practices.

The Commission requests comments on the new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at www.legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under the authority of Texas Government Code, §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also proposed under the authority of Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal implements Texas Government Code, Chapter 466.

§401.102. Protests of the Terms of a Formal Competitive Solicitation.

(a) Any person aggrieved by the terms of any formal solicitation may protest the agency's action to the director of administration. If the director of administration cannot resolve the protest, the aggrieved party may appeal the director of administration's decision to the executive director. If the executive director cannot resolve the protest, the aggrieved party may appeal the executive director's decision to the Texas Lottery Commission. Irrespective of the foregoing provision and the following processes, at any time, the executive director may refer a protest directly to the Texas Lottery Commission for determination. The procedures applicable to an appeal to the commission will then apply.

(b) A protest of the terms of any solicitation must be filed, in writing, with the commission's general counsel within 72 hours after issuance of the formal competitive solicitation. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the protest is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. A protest not filed timely will not be considered, and the protestant will be so notified in writing by the commission's general counsel. A protestant may supplement its filed protest. The deadline to supplement is 5 p.m. central time, 10 days after the solicitation is issued.

(c) To be considered, a protest must contain:

(1) a specific identification of the statutory provision, rule provision, or procurement procedure allegedly violated;

(2) a brief statement of the relevant facts;

(3) an identification of the issue or issues to be resolved;

(4) arguments and authorities in support of the protest; and

(5) an affidavit that the contents of the protest are true and correct.

(d) In the event of a timely filed protest of a competitive solicitation, the agency will not proceed with issuance of a purchase order or execution of a contract unless the agency determines, in writing, that such action is necessary to protect the interests of the lottery.

(e) The director of administration will review the protest, and the solicitation file, and will make a written determination of the protest. The written determination of the protest may include a determination canceling the solicitation. The director of administration's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal of the decision of the director of administration of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business

day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(f) On appeal of the director of administration's determination, the executive director will review the protest, and the solicitation file, and will make a written determination of the protest. The written determination on the protest may include a determination canceling the solicitation. The executive director's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal to the Texas Lottery Commission of the determination of the executive director must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(g) On timely receipt of the notice of appeal to the Texas Lottery Commission, the general counsel will appoint a staff attorney who has not participated in the drafting of the solicitation or rendered legal advice with respect to the solicitation to evaluate the protest. The staff attorney will make a written recommendation to the Texas Lottery Commission, including proposed findings of fact and conclusions of law.

(h) The Texas Lottery Commission, at its discretion, may allow oral argument by the protestant. The following procedure will be followed if the Texas Lottery Commission grants oral argument:

(1) Each oral argument may be limited in time as deemed appropriate by the Texas Lottery Commission.

(2) Each oral argument will be based solely on the written protest.

(3) The executive director may be present, have the opportunity to make a presentation to the Texas Lottery Commission regarding the protest of the terms of the formal competitive solicitation, and may be available to respond to questions by the Texas Lottery Commission.

(4) The staff attorney who made the written recommendation to the Texas Lottery Commission may also be present to respond to any questions by the Texas Lottery Commission.

(i) The Texas Lottery Commission will review the protest, the solicitation file, consider the oral argument, if any, the executive director's presentation, the staff attorney's recommendation, and will make a written determination of the protest. The written determination on the protest may include a determination canceling the solicitation. The Texas Lottery Commission's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. The Texas Lottery Commission's determination shall be administratively final when issued.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806515

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §401.103

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.103 (relating to Protests of Contract Award). The new rule is proposed concurrently with the proposed repeal of 16 TAC §401.103 (relating to Protests of Contract Award).

The purpose of the proposed new rule is to provide for a timely, efficient, and effective protest procedure to contract awards; to recognize and allow some protests to be resolved at the staff level, or executive director level, yet still provide a path for protestants to carry their protests directly to the Commissioners of the Texas Lottery Commission, where appropriate; to provide for a member of the legal staff who has not been involved in the procurement process to provide factual and legal advice and recommendation to the Commissioners; and to clarify and conform the protest process to applicable law and practice.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Mike Fernandez, Director of Administration, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit anticipated will be that the rule provides ease and efficiency to the vendor community to protest the agency's award of contracts; and will conform the agency rules to the statutory requirements and agency practices.

The Commission requests comments on the new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at www.legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal implements Texas Government Code, Chapter 466.

§401.103. Protests of Contract Award.

(a) Any bidder or proposer aggrieved by a contract award may protest the agency's action to the director of administration. If the director of administration cannot resolve the protest, the aggrieved party

may appeal the director of administration's decision to the executive director. If the executive director cannot resolve the protest, the aggrieved party may appeal the executive director's decision to the Texas Lottery Commission. Irrespective of the foregoing provision and the following processes, at any time, the executive director may refer the protest directly to the Texas Lottery Commission for determination. The procedures applicable to an appeal to the commission will then apply.

(b) A protest of any contract award must be filed, in writing, with the commission's general counsel within 72 hours after receipt of notice of execution of the contract. A copy must be delivered to the successful bidder or proposer at the same time that the protest or supplement is delivered to the agency. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the protest is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel and to the successful bidder or proposer. A protest not filed timely will not be considered, and the protestant will be so notified in writing by the commission's general counsel. A protestant may supplement its filed protest. The deadline to supplement is 5 p.m. central time, 10 days after notice of contract award.

(c) In the event of a protest of a contract award made pursuant to a formal competitive solicitation, the successful proposer(s) may file a written response to the protest within 72 hours after the commission's receipt of the protest or any supplemental filing. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the response is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. Responses not filed timely will not be considered, and the respondent will be so notified in writing by the commission's general counsel.

(d) To be considered, a protest must contain:

(1) a specific identification of the statutory provision, rule provision, or procurement procedure allegedly violated;

(2) a brief statement of the relevant facts;

(3) an identification of the issue or issues to be resolved;

(4) arguments and authorities in support of the protest;

(5) an affidavit that the contents of the protest are true and correct; and

(6) a certification that a copy of the protest has been served on the successful proposer(s).

(e) In the event of a timely filed protest of a contract award, the executive director will be notified and may abate the award of the contract until the protest is finally resolved.

(f) The director of administration will review the protest, and the contract award file, and any responses; and will make a written determination of the protest. The written determination on the protest may include a determination to cancel the award of the contract. The director of administration's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal of the determination of the director of administration of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(g) In the event of an appeal of the director of administration's determination, the successful proposer(s) may file a written response to the appeal within 24 hours after the commission's receipt of the appeal. The stamp affixed by the office of the general counsel shall determine the time and date of filing. If the response is filed by facsimile transmission, the quality of the original hard copy shall be clear and dark enough to transmit legibly and it shall be the sender's sole responsibility to ensure complete, timely, and legible delivery to the office of the general counsel. Responses not filed timely will not be considered, and the respondent will be so notified in writing by the commission's general counsel.

(h) On appeal of the director of administration's determination, the executive director will review the protest, and the contract award file, and any responses, and will make a written determination of the protest. The written determination on the protest may include a determination abating the award of the contract. The executive director's written determination will be served, by facsimile, on the protestant. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. An appeal to the Texas Lottery Commission of the determination of the executive director of any protest must be filed, in writing, with the commission's general counsel by 5 p.m. of the next business day after issuance of the written determination. The stamp affixed by the office of the general counsel shall determine the time and date of filing.

(i) On timely receipt of the protest and any response, the general counsel will appoint a staff attorney who has not participated in the decision to award the contract to evaluate the protest and any response. The staff attorney will make a written recommendation to the Texas Lottery Commission, including proposed findings of fact and conclusions of law.

(j) The Texas Lottery Commission, at its discretion, may allow oral argument by the protestant and the successful bidder or proposer. The following procedure will be followed if the Texas Lottery Commission grants oral argument:

(1) Each oral argument may be limited in time as deemed appropriate by the Texas Lottery Commission;

(2) Each oral argument will be based solely on the written protest;

(3) The executive director may be present, have the opportunity to make a presentation to the Texas Lottery Commission regarding the protest of the contract award, and may be available to respond to questions by the Texas Lottery Commission;

(4) The staff attorney who made the written recommendation to the Texas Lottery Commission may also be present to respond to any questions by the Texas Lottery Commission.

(k) The Texas Lottery Commission will review the protest, the contract award file, any responses, consider the oral argument, if any, the executive director's presentation, and the staff attorney's recommendation. The Texas Lottery Commission will make a written determination of the protest, including findings of fact and conclusions of law. The written determination may include a determination voiding the contract or sustaining the contract. The Texas Lottery Commission's written determination will be served, by facsimile, on the protestant and all affected parties. Confirmation of delivery to the designated facsimile machine will be conclusive proof that delivery was made. The Texas Lottery Commission's determination shall be administratively final when issued.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806516
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.409

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.409 (relating to Amendment for Change of Premises or Occasions Due to Lease Termination or Abandonment). The purpose of the new rule is to clarify the process and timelines for licensed authorized organizations and commercial lessors when submitting an amendment application for a change in bingo premises or occasion due to lease termination or abandonment.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit expected from the adoption of the new rule is providing to licensed authorized organizations and commercial lessors the process for application and timelines when a licensee desires to file an amendment application due to a lease termination or abandonment.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on January 21, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.409. Amendment for Change of Premises or Occasions Due to Lease Termination or Abandonment.

(a) An application for a license amendment filed jointly by a licensed authorized organization and a commercial lessor in accordance with Texas Occupations Code, §2001.108 must be:

(1) for the same premises, day(s), and time(s) that another licensed authorized organization that has ceased or will cease to conduct bingo is licensed to conduct bingo;

(2) on a form prescribed by the Commission; and

(3) submitted to the Commission within 21 calendar days of an organization's ceasing to conduct bingo.

(b) For purposes of this section, "abandonment" means a licensed authorized organization's relinquishment of its licensed playing day(s) and time(s) at a bingo premises with the intention of never again conducting bingo at the premises on the day(s) and time(s) under the license and lease agreement then in effect.

(c) The application described in subsection (a) of this section must include:

(1) notice to the Commission of the abandonment of licensed playing day(s) and time(s) or premises or lease termination on the appropriate form prescribed by the Commission;

(2) a copy of written notification provided by the commercial lessor to the currently licensed authorized organization stating that the organization's lease has been terminated, if applicable;

(3) a statement that the applicants have provided a copy of the application to the licensed authorized organization ceasing to conduct charitable bingo;

(4) additional supporting documentation related to the lease termination or abandonment of the premises, such as:

(A) correspondence from the licensed authorized organization that abandoned the time or premises indicating intent to abandon; and

(B) statements from persons with direct knowledge of pertinent events.

(5) the license of the organization that has abandoned the premises, if available.

(d) An application under this section is considered filed on the date the completed application and all documents listed in subsection (c) of this section are received by the Commission.

(e) No later than ten calendar days after the date the application is filed with the Commission or the effective date of the licensed authorized organization's lease termination, whichever is later, the Commission will act on the joint application filed under this section and notify the applicants by:

(1) requesting additional information;

(2) denying the application; or

(3) issuing an amended license.

(f) If the Commission fails to act timely on an application submitted in accordance with Texas Occupations Code, §2001.108 and this section, the applicant licensed authorized organization must submit written notification to the Commission of its intent to begin conducting bingo for the specified date(s), time(s), and premises identified on the pending application.

(1) The applicant licensed authorized organization must conspicuously display a copy of the written notification to the Commission at the premises at which bingo is conducted at all times during the conduct of bingo.

(2) The applicant licensed authorized organization must immediately cease conducting bingo for the specified day(s), time(s), and premises identified on the application upon receipt of written notification that the Commission denies the application or requests more information.

(g) The denial of an application under this section does not affect a licensed authorized organization's existing annual license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806504
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §402.412

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.412 (relating to Signature Requirements). The purpose of the new rule is to provide the Commission's requirements for a valid signature and to clarify the signature requirements for forms prescribed by the Commission.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit expected from the adoption of the new rule is provision to licensees of the requirements for a valid signature and who must sign forms prescribed by the Commission.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on January 21, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.412. Signature Requirements.

(a) Any application, form, or other notification requiring a signature must bear the original signature of the individual signing the document.

(b) For a signature to be considered original, the document must be signed by:

(1) the person whose signature appears; or

(2) a person who has been granted power of attorney for an individual.

(c) A person who has been granted power of attorney to sign for an individual must provide a copy of the power of attorney to the Commission.

(d) Without executing a power of attorney to an individual, a person may not designate another individual to sign for them in any manner or affix a stamp of their signature on their behalf. Signatures by other than the hand of the person whose signature appears or by a person granted power of attorney for the individual will be considered a false statement under Occupations Code, §2001.554, Bingo Enabling Act.

(e) The Commission considers the following categories of e-mail as bearing an original signature:

(1) e-mail originating from an individual whose personal e-mail address has previously been submitted to the Commission and the e-mail includes the:

(A) sender's name;

(B) associated organization's name; and

(C) address of either the individual or organization on file with the Commission.

(2) e-mail that contains a digital signature.

(f) A photocopy, facsimile, or PDF version of a completed form will be considered an original document containing original signatures provided that the original document contains the original signatures.

(g) The printed name of the person signing the application form should be provided for any signature at the time of filing.

(h) Forms prescribed by the Commission must bear the original signature of the person(s) holding the position(s) identified on the form as being required to sign the form. The persons signing the forms must have been identified previously as holding the required position(s) by submitting a form prescribed by the Commission.

(i) A form prescribed by the Commission requiring two signatures must bear the signatures of two different persons unless only one person within the organization holds both required positions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806511
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §402.424

The Texas Lottery Commission (Commission) proposes new 16 TAC §402.424 (relating to Amendment of a License by Telephone or Facsimile). The purpose of the new rule is to set forth for licensees the process and timelines to follow when submitting by telephone or facsimile an amendment to a license to conduct bingo.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the public benefit expected from the adoption of the new rule is to provide licensees the specific application process and timelines to follow when a licensee wishes to submit a telephone or facsimile request to change the time or date of their bingo occasion.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed rule may be submitted to Sandra Joseph, Special Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at www.legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on January 21, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Texas Occupations Code, Chapter 2001.

§402.424. Amendment of a License by Telephone or Facsimile.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Personal identification number (P.I.N.)--A five digit number uniquely assigned by the Commission to each licensed authorized organization for the purpose of validating a caller's authority to make changes by telephone to the day(s) or time(s) bingo is conducted by the organization.

(2) Effective date--The first day that the changes to the day(s) or time(s) bingo is conducted by the organization are to begin.

(b) A licensed authorized organization may change the day(s) or time(s) it conducts bingo by telephone or facsimile provided the organization has sufficient amendment license fee credit. The request should be received no later than noon the business day before the requested effective date of the amended license.

(1) To change by telephone the day(s) or time(s) the organization conducts bingo, a requestor must speak directly to an examiner in the licensing section of the Charitable Bingo Operations Division and supply the organization's P.I.N.

(A) Control of a P.I.N. is the responsibility of the organization. An organization is responsible for all bingo activities conducted under an approved license change when a valid P.I.N. is provided.

(B) To change an organization's P.I.N., the Commission must receive a written request from the organization's chief executive officer.

(2) To change via facsimile request the day(s) or time(s) the organization conducts bingo, the Commission must receive a completed application at the facsimile number provided on the prescribed application form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806512
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 344-5012

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 76. EXTRACURRICULAR ACTIVITIES

SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §76.1003

The Texas Education Agency (TEA) proposes new §76.1003, concerning safety training requirements. The proposed new rule would establish in rule extracurricular athletic activity safety training requirements in accordance with the Texas Education Code (TEC), §33.202, as added by Senate Bill (SB) 82, 80th Texas Legislature, 2007.

Through SB 82, the 80th Texas Legislature added the TEC, §33.202, requiring the commissioner to develop and adopt

an extracurricular activity safety training program. The program must include training in emergency action planning; cardiopulmonary resuscitation (CPR); communicating with 9-1-1 emergency service operators and other emergency personnel; and recognizing symptoms of potentially catastrophic injuries.

Proposed new 19 TAC Chapter 76, Extracurricular Activities, Subchapter AA, Commissioner's Rules, §76.1003, Extracurricular Athletic Activity Safety Training Requirements, would require that all coaches, trainers, marching band directors, sponsors, and certain physicians who assist with extracurricular athletic activities meet certain safety requirements or complete a safety training course beginning with the 2008-2009 school year. Proposed new subsection (a) would adopt the Extracurricular Activity Safety Training Program provided by the University Interscholastic League (UIL) as an extracurricular athletic activity safety training program. Proposed new subsection (b) would adopt the educational requirements for licensure as a licensed athletic trainer for the same purpose. Proposed new subsection (d) would establish the educational requirements for physicians.

As required by the TEC, §33.206, school districts would maintain documentation that specified staff and volunteers meet the minimal safety training requirements.

Jeff Kloster, Associate Commissioner for Health and Safety, has determined that for the first five-year period the new rule is in effect there will be fiscal implications for local government as a result of enforcing or administering the proposed new rule. The total estimated costs for school districts to comply with the proposal would be $300,000 each year during fiscal years 2009-2013. Beginning with the 2008-2009 school year, school districts would be required to provide safety training courses for all coaches, certain trainers, and sponsors and certain physicians who assist with extracurricular athletic activities. The TEC, §33.202, includes certification in CPR as one of the elements of the training for those staff who are not currently required to hold CPR certification under the TEC, §33.086. Approximately 6,000 staff would be trained each year to maintain two-year certification at a cost of about $50 per individual for the total annual estimated cost of $300,000. School districts may also choose to pay the fee for CPR certification for volunteers, depending on district procedure and policy, but it is not possible to estimate how many districts or volunteers would be impacted. There would be no fiscal implications anticipated for the state. The TEC, §33.202, adds provisions concerning safety regulations for extracurricular activities in public schools and other schools subject to UIL regulations. The UIL is developing the safety training for the specified school district employees at no additional cost to the state.

Mr. Kloster has determined that for each year of the first five years the new rule is in effect the public benefit anticipated as a result of enforcing the new rule will be implementation of training requirements to prevent injury and possibly death during extracurricular athletic events. Staff and volunteers responsible for ensuring the health and well-being of Texas schoolchildren would be better prepared to respond to emergencies. There may be anticipated economic cost to persons who are required to comply with the proposed new rule. The TEC, §33.202, includes CPR certification as a required element for safety training. Individuals who volunteer to assist with extracurricular activities may already be CPR certified, however, some may not. In some instances, school districts may pay the fee for CPR certification for volunteers, depending on district procedure and policy. The cost to districts or individuals for CPR certification could range between $30 and $100 per person.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins December 26, 2008, and ends January 26, 2009. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on December 26, 2008.

The new rule is proposed under the TEC, §33.202, which authorizes the commissioner by rule to develop and adopt an extracurricular activity safety training program.

The proposed new rule implements the TEC, §33.202.

§76.1003. Extracurricular Athletic Activity Safety Training Requirements.

(a) The commissioner of education, in compliance with the Texas Education Code (TEC), §33.202, adopts the Extracurricular Activity Safety Training Program, provided by the University Interscholastic League, as an extracurricular athletic activity safety training program.

(b) The commissioner of education, in compliance with the TEC, §33.202, adopts the educational requirements for licensure as a licensed athletic trainer, as set forth in 22 TAC §871.7 (relating to Qualifications) and 22 TAC §871.12 (relating to Continuing Education Requirements), as an extracurricular athletic activity safety training program.

(c) The following persons must satisfactorily complete an adopted extracurricular athletic activity safety training program specified in subsection (a) or (b) of this section:

(1) a coach or sponsor for an extracurricular athletic activity;

(2) a trainer, except as provided by subsection (b) of this section;

(3) a director responsible for a school marching band; and

(4) a physician who is employed by a school or school district or who volunteers to assist with an extracurricular athletic activity, except as provided by subsection (d) of this section.

(d) A physician who is employed by a school or school district or who volunteers to assist with an extracurricular athletic activity is not required to complete the safety training program if the physician submits to the school or school district documentation of successful completion of continuing medical education sufficient to comply with the continuing medical education requirements of the Texas Occupations Code, §156.051, and that the physician's continuing medical education specifically addresses emergency medicine.

(e) Beginning with the 2008-2009 school year, each school district shall ensure and maintain documentation that each person subject to the TEC, §33.202, has satisfactorily completed the extracurricular athletic activity safety training program required by this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806479
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy proposes amendments to §291.33 concerning Operational Standards. The amendments, if adopted, clarify that prescription labels and written information provided to consumers must be printed in a type-size no smaller than 10-point Times Roman and clarify that the prescription label is not required to include the identification code or initials of the dispensing pharmacist if the information is stored in the pharmacy's data processing system.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to ensure that only qualified individuals are allowed to practice pharmacy. There is no fiscal impact for individuals, small or large businesses or to other entities which are required to comply with this section.

Comments on the proposed amendments may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, FAX (512) 305-8082. Comments must be received by 5 p.m., January 30, 2009.

The amendments are proposed under §551.002, §554.051, §562.006, and §562.0061 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §562.006 and §562.0061 as authorizing the agency to adopt rules regarding the prescription label and written information provided to consumers.

The statutes affected by this rule: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) - (b) (No change.)

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) (No change.)

(B) Such communication:

(i) - (iv) (No change.)

(v) shall be reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information.

(I) Written information must be in plain language designed for the consumer and printed in a type size no smaller than ten-point Times Roman. [~~easily readable font size.~~]

(II) - (III) (No change.)

(C) - (I) (No change.)

(2) - (6) (No change.)

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in a type size no smaller than ten-point Times Roman [~~an easily readable font size~~] with at least the following information:

(i) - (xiii) (No change.)

(B) If the prescription label required in subparagraph (A) of this paragraph is printed in a type size smaller than 10-point Times Roman, the pharmacy shall provide the patient written information containing the information specified in subparagraph (A) of this paragraph in a type size no smaller than ten-point Times Roman.

(C) The label is not required to include the initials or identification code of the dispensing pharmacist specified in subparagraph (A) of this paragraph if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's date processing system.

(D) [~~(B)~~] The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner and, if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order; and

(II) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(d) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806501
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 305-8028

♦ ♦ ♦

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.6

The Texas Board of Physical Therapy Examiners proposes an amendment to §329.6, concerning Licensure by Endorsement. The amendment would require verification of licensure from all states in which an applicant holds or has held a physical therapy license.

John P. Maline, Executive Director, has determined that for the first five-year period this amendment is in effect there will be no additional costs to state or local governments as a result of enforcing or administering this amendment.

Mr. Maline has also determined that for each year of the first five-year period this amendment is in effect the public benefit will be assurance that the board has reviewed all of the professional history of licensure applicants to determine whether they are qualified to practice in Texas. The probable economic costs to persons required to comply with the proposed amendment will vary, depending on the number of states in which a person has been licensed. For an applicant licensed in only one state, the cost will not change. However, for applicants who are or have been licensed in more than one state, the cost of license verification will increase based on the number of licenses held. The cost for verification of license also varies state by state. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore no economic impact statement or regulatory flexibility analysis is required for the amendment.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by this amendment.

§329.6. Licensure by Endorsement.

(a) Eligibility. The board may issue a license by endorsement to an applicant currently licensed in another state, District of Columbia, or territory of the United States, if they have not previously held a permanent license issued by this board.

(b) Requirements. An applicant seeking licensure by endorsement must:

(1) meet the requirements as stated in §329.1 of this title (relating to General Licensure Requirements and Procedures); and

(2) submit a passing score on the National Physical Therapy Examination sent directly to the board by the board-approved reporting service, or scores on the Registry Examination sent directly to the board by the American Physical Therapy Association. The applicant's score must meet one of the conditions listed in subparagraphs (A) - (C) of this paragraph:

(A) The applicant must have passed the national examination given on or after January 1, 1993, with the score required by the board for that exam.

(B) The applicant must have obtained a score of 1.5 standard deviations below the nationwide mean on an examination given prior to January 1, 1993.

(C) The applicant must have obtained a score of 75% or higher for the Registry Examination taken prior to September 1971; and

(3) submit verification of licensure in good standing from all states in which the applicant holds or has held a license [~~the licensing board in the jurisdiction in which the applicant is currently licensed~~]. This verification must be sent directly to the board by the licensing board in that jurisdiction.

(c) Provisional licensure. The board may grant a provisional license under the conditions listed below. The applicant must submit the provisional license fee as set by the executive council, and meet all other requirements of licensure by examination or endorsement as set by the board. The board may not grant a provisional license to an applicant with disciplinary action in their licensure history. The provisional license is valid for 180 days, or until a permanent license is issued or denied, whichever is first. The conditions under which the board may grant a provisional license are:

(1) The applicant is applying for licensure by endorsement, and there is a delay in the submission of required documents outside the applicant's control; or

(2) The applicant has previously held a Texas license and is currently licensed in another state that has licensing requirements substantially equivalent to those of Texas, but has not worked as a PT or PTA for the two years prior to application for a license in Texas, and must submit to reexamination to restore the Texas license as stated in [~~(see~~] §341.1[~~,~~] of this title (relating to Requirements for Renewal).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2008.

TRD-200806429
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 305-6900

♦ ♦ ♦

CHAPTER 341. LICENSE RENEWAL

22 TAC §341.6

The Texas Board of Physical Therapy Examiners proposes amendments to §341.6, concerning License Restoration. The amendments would give people who restore their Texas licenses a full two year period of licensure before their licenses would expire. Currently, they are given no more than two years and no less than one year of licensure, based on their original license expiration date. The amendments also would require verification of licensure from all states in which an applicant holds or has held a license, and include editorial changes to language intended to clarify existing statements and requirements.

John P. Maline, Executive Director, has determined that for the first five-year period this amendment is in effect there will be no additional costs to state or local governments as a result of enforcing or administering this amendment.

Mr. Maline has also determined that for each year of the first five-year period this amendment is in effect the public benefit will be less confusion about the expiration date of the restored license and the continuing education required to renew it, and assurance that the board has reviewed all of the professional history of a licensure applicant to determine whether they are qualified to practice in Texas The probable economic costs to persons required to comply with the proposed amendment will vary, depending on the number of states in which a person has been licensed. For an applicant licensed in only one state, the cost will not change. However, for applicants who are or have been licensed in more than one state, the cost of license verification will increase based on the number of licenses held. The cost for verification of license also varies state by state. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore no economic impact statement or regulatory flexibility analysis is required for the amendment.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by this amendment.

§341.6. License Restoration.

(a) Eligibility. A person whose license has been expired for one year or longer may restore the license without reexamination if she or he holds a current license in another state, and has actively practiced in another state for the two years preceding the application for restoration.

(b) Duration. The original expiration date of a restored license will be adjusted so that the license will expire two years after the month of restoration. [~~When a license is restored, the expiration date will be calculated using the original month of issuance. The restored license will be valid for no less than one year, and no more than two years, from the date of issuance.~~]

(c) Requirements. The components required for restoration of a license are:

(1) a notarized restoration application;

(2) a passing score on the jurisprudence examination;

(3) a fee equal to the cost of the license examination fee [~~for licensure~~];

(4) Verification of Licensure from all states in which the applicant holds or has held a license [~~the current licensed state for the two years preceding the application~~]; and

(5) a history of employment for the two years preceding the application.

(d) Renewal of a restored license. To renew a license that has been restored, a licensee must comply with all requirements in §341.1 of this title (relating to Requirements for Renewal).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2008.

TRD-200806430
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 305-6900

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER L. WATER INFRASTRUCTURE FUND

31 TAC §363.1204

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Water Development Board (Board) proposes the repeal of §363.1204, concerning Availability of Funds.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEAL.

Currently, §363.1204 provides that the Board will determine the amount of funds available for financial assistance from the Water Infrastructure Fund (WIF) for each fiscal year. The rule is unnecessary and is proposed for repeal. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand in the WIF and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the WIF, and the rule only creates an unnecessary administrative burden on the Board.

SECTION BY SECTION DISCUSSION.

The proposed repeal of §363.1204 will delete the requirement that, for each fiscal year, the Board will determine the amount of funds to be available from all sources to the WIF for financial assistance. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the WIF and this rule creates an unnecessary administrative burden on the Board and should be repealed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Melanie Callahan, Deputy Executive Administrator, has determined that there will be no fiscal implications for state or local governments as a result of the proposed repeal.

PUBLIC BENEFITS AND COSTS.

Ms. Callahan also has determined that for each year of the first five years the proposed repeal is in effect, the public will benefit from the repeal because it will clarify and enhance the efficiency of the Board's operations and will impose no new requirements on the public or persons required to comply with the repeal as proposed.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this repeal. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the repeal as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed repeal is not subject to Texas Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of the proposed repeal will constitute neither a statutory nor a constitutional taking of private real property. The proposed repeal does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed repeal does not burden nor restrict or limit the owner's right to property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed repeal will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.state.tx.us, or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

The repeal is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board; §15.977, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter Q; and §15.995, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R.

Cross reference to statute: Texas Water Code, Chapter 15.

§363.1204. Availability of Funds.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806513
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 463-8061

♦ ♦ ♦

CHAPTER 384. RURAL WATER ASSISTANCE FUND

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §384.4

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Water Development Board (Board) proposes the repeal of §384.4, concerning Availability of Funds and Distribution of Loans.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEAL.

Currently, §384.4 provides that the Board will determine the amount of funds available for financial assistance from the Rural Water Assistance Fund (RWAF) for each fiscal year. The rule is unnecessary and is proposed for repeal. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand in the RWAF and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the RWAF, and the rule only creates an unnecessary administrative burden on the Board.

SECTION BY SECTION DISCUSSION.

The proposed repeal of §384.4 will delete the requirement that, for each fiscal year, the Board will determine the amount of funds available from all sources for financial assistance from the RWAF for that fiscal year, and will determine the amount of funds available for loans and for other purposes for which the fund may be used. In its resolutions, the Board conditions its commitment to provide financial assistance on the availability of funds, so Board staff continually determines the amount of funds on hand in the RWAF and recommends bond sales as necessary to raise funds. Thus, it is not necessary for the Board to make an annual fiscal-year determination of the amount of funds available in the RWAF, and this rule only creates an unnecessary administrative burden on the Board.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Melanie Callahan, Deputy Executive Administrator, has determined that there will be no fiscal implications for state or local governments as a result of the proposed repeal.

PUBLIC BENEFITS AND COSTS.

Ms. Callahan also has determined that for each year of the first five years the proposed repeal is in effect, the public will benefit from the repeal because it will clarify and enhance the efficiency of the Board's operations and will impose no new requirements on the public or persons required to comply with the repeal.

LOCAL EMPLOYMENT IMPACT STATEMENT

The Board has determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect because it will impose no new requirements on local economies.

The Board has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this repeal as proposed. The Board has also determined that there is no anticipated economic cost to persons who are required to comply with the repeal as proposed. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS.

The Board has determined that the proposed repeal is not subject to Texas Government Code §2001.0225 because it is not a major environmental rule under that section.

TAKINGS IMPACT ASSESSMENT.

The Board has determined that the promulgation and enforcement of the proposed repeal will constitute neither a statutory nor a constitutional taking of private real property. The proposed repeal does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed repeal does not burden nor restrict or limit the owner's right to property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMITTAL OF COMMENTS.

Comments on the proposed repeal will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.state.tx.us, or by fax at (512) 463-5580.

STATUTORY AUTHORITY.

The repeal is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board; §15.977, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter Q; and §15.995, which authorizes the board to adopt rules necessary to administer Texas Water Code, Chapter 15, Subchapter R.

Cross reference to statute: Texas Water Code, Chapter 15.

§384.4. Availability of Funds and Distribution of Loans.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806514
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 25, 2009
For further information, please call: (512) 463-8061

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §§55.115 - 55.119

The Office of the Attorney General, Child Support Division, adopts amendments to 1 TAC §§55.115 - 55.119, concerning forms for child support enforcement. The amended sections are adopted without changes to the proposed text as published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9163) and will not be republished.

The purpose of the amendments is to provide forms authorized by state and federal statutes, and forms used by the Office of the Attorney General, Child Support Division.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Family Code §158.106, which authorizes the Office of the Attorney General to prescribe forms for the collection of child support.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806499
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: January 4, 2009
Proposal publication date: November 14, 2008
For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the Department) adopts amendments to 10 TAC Chapter 1, §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines. Sections 1.31 - 1.33 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7811). Sections 1.34 - 1.37 are adopted without changes and will not be republished.

These sections are amended to improve guidelines for underwriting, market analysis, appraisal, environmental site assessment and property condition assessment performed in response to requests submitted to the Department. The amendments also effect requirements for reserve for replacement and provide for the subsequent monitoring of those reserves.

Public hearings on the proposed amendments were held in Austin (September 24, 2008), Fort Worth (September 26, 2008), Lubbock (September 29, 2008), El Paso (October 1, 2008), Brownsville (October 3, 2008), and Houston (October 6, 2008). Additionally, written comments on the proposed amendments were accepted by mail, e-mail, and facsimile through October 20, 2008.

SUMMARY OF COMMENTS, DEPARTMENT RESPONSE AND BOARD ACTION.

Public comments and the Department's responses are presented in the order in which the sections appear in the QAP, starting with general comments on Subchapter B as a whole, and ending with comments on §1.37. Following the section number is the title of the section as it appears in the rule. Each number in the parenthesis corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and Department's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the amended sections.

Public comments on the proposed amendments were received by: (16) Lone Star Chapter of Sierra Club; (17) Individual; (31) International Code Council - Texas Field Office; (32) Foundation Communities; (38) New Hope Housing; (49) Coats/Rose; (54)

Foundation Communities; (58) Community Partnership for the Homeless; (60) S2A Development Consulting; and, (61) individual.

COMMENT (58): §1.31(b)(24). Supportive Services. Comment was made suggesting that the QAP use the same definition as that in the Real Estate Analysis Guidelines. (32, 54) Comment was made recommending that the definition of supportive housing be clarified so that the definition, in the QAP and REA Rules, allows supportive housing to be integrated into different types of developments.

DEPARTMENT RESPONSE: This request relating to integration into different types of developments warrants further research and additional public comment. Department will consider this in the draft 2010 QAP. The following change was made to clarify the definition:

"Supportive Housing: Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services."

COMMENT (60): §1.32(d)(1)(A). Rental Income. The commentor contends that the proposed change creates opportunity for subjective rather than objective analysis of a project's financial proposal. Additionally, the change leaves too much room for negotiation on the part of the Underwriter and more finite guidelines for this are recommended. A market study could be used, for example.

DEPARTMENT RESPONSE: The Department does use the market study in determining the rental income for a development. However, in some instances the Underwriter has access to more current or accurate information which should be used to assess the appropriateness of the achievable rents. Department recommends no change at this time but will continue to look for methods of providing more finite guidelines in the future.

COMMENT (16): §1.32(d)(1)(A)(iii). Gross Program Rents less Utility Allowance or Net Program Rents. Commentor suggests adding language specifying that the Utility Allowance must consider any energy efficient provisions of the proposed building that might lead to additional energy savings and thus lower utility costs. Commentor suggests adding a sentence to read:

"The Utility Allowance figures used should take into account any energy efficient measures that will be taken by the Applicant and are verifiable and measurable."

DEPARTMENT RESPONSE: Department concurs with the intent of the proposed change and has included similar language in the utility expense section of the rules (§1.32(d)(2)) to specify that utility expenses must consider any energy efficient provisions of the proposed building. The section proposed for change by the commentor is a reference to one of the uses of the Utility Allowance rather than the definition of the Utility Allowance §1.31(b)(29) which was not proposed for amendment in the draft rule and may need to be re-evaluated for change in the 2010 rules. The change in the location as proposed could result in confusion over the acceptable source for Utility Allowances for different purposes. It should also be noted that the existing definition provides a method for verification of an alternative Utility Allowance.

COMMENT (60): §1.32(d)(2). Expenses. Commentor contends that requiring estimates of utility savings from green building components be documented by experience of third parties not related to the contractor or component vendor will be extremely difficult and costly to find. Vendors are who are most familiar with the energy use of their products and an engineer will charge a substantial fee to make these calculations. Commentor would like to see the Department either provide unbiased information regarding utility savings or allow developers to use the lesser of three calculations provided by vendors.

DEPARTMENT RESPONSE: The Department believes it is prudent for the Applicant to have the cost savings of new or untested technologies verified by third parties rather than the purveyor of the product. The rule as proposed does not prohibit the use of multiple independent vendors to provide information to the Applicant and Department even if ultimately, one of the multiple vendors submitting information would be chosen based on the information presented.

COMMENT (16): §1.32(d)(2). Expenses. Commentor is supportive of the added language on green building components but would suggest adding the words ", including on-site renewable energy," after "green building components" as reflected below:

Section 1.32(d)(2). Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of properties in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by experience of third parties not related to the contractor or component vendor. Finally, well documented information provided in the Market Analysis, the Application, and other sources may be considered.

DEPARTMENT RESPONSE: While the proposed language did not exclude the commentor's addition, Department concurs with the proposed change and amended this section as proposed by commenter.

COMMENT (58): §1.32(d)(2)(I). Reserves. A general comment for the QAP was made that more appropriately is addressed in the REA rules. Commenter asked the Department to clarify that larger funded reserves can be underwritten in cases where the requirement for such a reserve is documented by a lender or syndication letter.

DEPARTMENT RESPONSE: The rule requires minimum deposits and does not state a maximum. The actual level of funding for reserves is reviewed on an individual basis and adjustments made as warranted by underwriting review and the rule in §1.32(d)(2)(I) states "Higher levels of reserves also may be used if they are documented in the financing commitment letters."

COMMENT (58): §1.32(d)(2)(I). Reserves. Commentor supports the clarification that larger funded reserves can be underwritten in cases where the requirement for such a reserve is documented by a lender or syndicator letter.

DEPARTMENT RESPONSE: Department appreciates support for the amended language and recommends no additional change.

COMMENT (38): §1.32(d)(5). Long Term Proforma. The commenter suggests reconsideration of the proposed changes to this rule that will reduce both the annual growth factor for expenses and income by one percent. Commentor contends that the amendment has the effect of projecting that the annual growth rate in expenses will be 50% bigger than the growth rate in income, whereas under the current rules the difference is only 33.3%. This cumulative change can become quite significant over the period of 15 to 30 years. The Commentor requests that the Department keep the growth factor proportional and recommends reducing the growth factor for expenses to 2.66% while keeping the growth factor for income at 2%.

DEPARTMENT RESPONSE: In formulating the amendment the Department informally surveyed a wide variety of lenders and syndicators for best practices and found the most common rates to be 3% /4% and 2%/3% with a definite trend toward 2%/3% as underwriting standards tighten. Shifting to the Commentor's proposed 2%/2.66% would effectively loosen underwriting standards compared to the Department's historical 3%/4% because it would allow for even higher than historical levels of deferred developer fee. Department recommends no change to the amended language proposed in the draft, but if a change is made, the original rates of 3%/4% would be more prudent.

COMMENT (60): §1.32(e)(4)(A). Direct Construction Costs. Commenter requested specific clarification of the published data sources the Department intends to use and to provide that information to developers and applicants.

DEPARTMENT RESPONSE: The Department currently utilizes Marshall and Swift's "Residential Cost Handbook" primarily to estimate direct construction costs for new construction applications, and anticipates that the Department will continue to do so. However, given concerns regarding the limitation of use of this data source in the past Department also wanted the flexibility to explore other published data sources. As these other sources are used they will be referenced in the Underwriting report and opportunity for reconciliation by developers and applicants will be provided if necessary.

COMMENT (17): §1.32(e)(6). Contractor Fee. Commenter contends that the current limits on contractor fees (6% for general requirements and 2% for overhead, respectively) are too low for smaller rural deals and make it more difficult for these deals to get done. Commentor suggests implementing a tiered system with an additional 2% contractor fee for applications whose total costs are lower than $3,000,000 and an additional 4% for applications who total costs are lower than $2,000,000.

DEPARTMENT RESPONSE: Department did not amend this section of the rule and did not recommend a change at this time but recommended studying the proposal for possible inclusion in the 2010 rules. Department notes the current rule allows 14% fees for all contractor fees including general requirements, overhead and profit which can be distributed among those three categories as needed.

COMMENT (49): §1.32(e)(7)(A). Developer Fee. Commenter contends that developers of Supportive Housing must do more work than ordinary developers because these transactions require layers of financing not required of typical tax credit developments. Supportive Housing developers also assume greater risk because their residents are often extremely low-income and unable to pay rent without subsidies. The agency currently allows developer fee to be 20% for developments proposing 49 units or less, and should also allow developer fee to be 20% for Supportive Housing developers.

DEPARTMENT RESPONSE: Department did not amend this section of the rule and is not recommending a change at this time but recommends studying the proposal for possible inclusion in the 2010 rules. Department notes that while some additional risk exists with Supportive Housing developments, the Department's existing rules provides significant reduction in several areas of risk by allowing more flexible financial feasibility criteria and by allowing Supportive Housing transactions with no loans and thus no repayment risk.

COMMENT (61): §1.32(i). Feasibility Conclusion. Commentor requests that the Executive Director have the ability to waive all feasibility criteria. Specifically, the commentor indicates that the Deferred Developer Fee criteria be included as a criteria that can be waived by the Executive Director because this issue is ultimately an investor decision. How long an investor is willing to live with the developer fee being deferred should be taken into account when determining if a development is feasible.

DEPARTMENT RESPONSE: §1.32(i)(6)(A) provides the Executive Director the authority to waive, on appeal, the characterization of infeasibility in the underwriting report on a case by case basis for all 5 feasibility conclusions but it does not require that the underwriting conclusion be changed in the original report. Section 1.32(i) dictates the Underwriter's feasibility conclusion but provides for exception criteria in §1.32(i)(6). This reference may be confusing and has been clarified to reference paragraph (6)(B) as follows:

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

COMMENT (61): §1.32(i)(1). Inclusive Capture Rate. Commentor indicates that the current capture rate rules, as written, may create unintended issues for developments proposing four bedroom single family houses for rent with the primary market area being limited to 100,000 persons. Commentor recommends that four bedroom single family homes, for capture rate purposes in 2009, be treated like Senior developments where the primary market area population be determined using areas populated by up to 250,000 people and the capture rate increased to 75%. The commentor further states that the demand for these homes has been proven and there is a strong public purpose for this modification.

DEPARTMENT RESPONSE: Department did not propose amendments to this section of the rule however an amendment to the Market Study rules was made to equalize the population

limit allowed for developments targeting elderly and family households. Data collected by the Department revealed that a majority of households for a development came from the development's zip code or immediately adjacent zip code supporting the primary market area limit as amended. Department recommends no additional change.

COMMENT (49): §1.32(i)(2). Concentration Rate. Commentor indicates that the site and neighborhood regulation is difficult for developers to understand and implement in their site selection decision-making. The current Concentration Rate regulation prohibits sites in densely developed areas, but allows sites in areas that would be prohibited by federal site and neighborhood standards as defined by the U.S. Department of Housing and Urban Development (HUD). The commentor recommends that the Department replace the Concentration Rate rule with a rule that requires compliance with HUD site and neighborhood standards.

DEPARTMENT RESPONSE: Department concurs and has amended the rule to delete the Concentration Rate feasibility criteria in the draft rules for 2009 since concentration issues are likely to be addressed through local city policy. Department recommends no additional change.

COMMENT (16): §1.33(a). Market Analysis Rules General Provisions. Commentor suggests the Department include language to clarify that the market analysis should examine both rents and expected utility costs. The commentor suggests the following language be added:

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford, including the expected costs of utilities. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

DEPARTMENT RESPONSE: Department agrees with the commentor's sentiment but did not propose amendments to this section of the rule and believes that the suggested change is redundant with Rental Income §1.32(d)(1)(A).

COMMENT (16): §1.33(d)(9) and (10). Market Information and Conclusions. Commentor suggests that more specific guidelines for including the cost of utilities in the market analysis could be referenced in these sections, but gave no specific language to include.

DEPARTMENT RESPONSE: Department believes specific guidance is given in the determination of rental income and utilities expenses as discussed previously. No additional changes are recommended.

COMMENT (31): §1.34(d)(7)(D). Description of Improvements. Commentor suggests the following language be added:

Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, including green building and on-site renewable energy, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

DEPARTMENT RESPONSE: The Department did not propose amendments to this section of the rule and believes the suggested change is redundant with the immediately preceeding reference to energy efficient measures. Department recommends no additional change.

ADMINISTRATIVE CLARIFICATIONS AND CORRECTIONS

Staff requested the Board's approval to make administrative changes as needed for consistency within the REA Rules as well as with other Department Rules. The changes include, but are not limited to correcting references to other rules such as specific sections of the QAP, capitalization of defined terms and correcting typographical mistakes, etc.

The BOARD approved the final order adopting these amendments, as well as administrative changes as needed for consistency within this subchapter, on November 13, 2008.

The amendments are adopted pursuant to authority granted in Chapter 2306, Texas Government Code, specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.148 which authorizes the Board to adopt underwriting standards for loans made or financed by the Department, §2306.186, which requires the establishment of reserve accounts for certain rental housing to fund necessary repairs; §2306.150, which requires the Department to adopt minimum property standards for housing developments; §2306.150, which requires the Department to evaluate market analyses and §2306.150 which requires the Department to use uniform threshold requirements for environmental reports.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee "the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP. Those terms that are not defined in the QAP or which may have another meaning when used in this subchapter, shall have the meanings set forth in §1.32(b) of this subchapter.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, unit amenities, utility structure, and common amenities, and

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(11) First Lien Lender--A lender whose lien has first priority.

(12) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance which are developed by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") or national non-metro area.

(13) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(14) Market Analyst--Any person who prepares a market study.

(15) Market Rent--The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units.

(16) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) Primary Market--Sometimes referred to as "Primary Market Area" or "Submarket" or "PMA". The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this subchapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(18) PCA--Property Condition Assessment. Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessments," "Property Condition Report," or "Property Work Write-Up." An evaluation of the physical condition of the existing property and evaluation of the cost of rehabilitation conducted in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter as it relates to a specific Development.

(19) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(20) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 50% of gross income towards total housing expenses.

(21) Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(22) Restricted Market Rent--The restricted rent concluded by the Qualified Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units with the same rent and income restrictions.

(23) Secondary Market--Sometimes referred to as "Secondary Market Area". The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this subchapter.

(24) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

(25) Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(26) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Subchapter A of Chapter 60 of this title, and published on the Department's web site.

(27) Underwriter--The author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(28) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least 12 consecutive months following construction completion.

(29) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development and consistent with the building plans provided.

(30) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, §1.7 and §1.8 of this chapter include general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in §1.17 of this chapter.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of an Underwriting Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report should consider all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. The Report should consider only information that is provided in accordance with the time frames provided in the current QAP, Program Rules or Notice of Funds Availability as appropriate. The Report should also identify the number of revisions and date of most current revision to any information deemed to be relevant by the Underwriter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the program limit method (if applicable), gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the Application documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will update the utility allowance and calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent") or Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent where the Applicant's projected rent is reasonable to the Underwriter. Where Contract Rents are included, they will be used regardless of the conservative basis derived rent.

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst

and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter.

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Applications are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of properties in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by experience of third parties not related to the contractor or component vendor. Finally, well documented information provided in the Market Analysis, the Application, and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will

require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or proposed payment in lieu of tax agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. The Applicant's expense for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund future capital needs as documented by the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If a rationale acceptable to the Underwriter for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter.

(i) Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement.

(ii) The maximum rate allowed for a competitive application cycle is determined by the Director of the Department's division responsible for Credit Underwriting Analysis Reports based upon current market conditions and posted to the Department's web site prior to the close of the Application Acceptance Period.

(B) Amortization Period. The Department requires an amortization of not less than thirty (30) years and not more than forty (40) years (fifty (50) years for federally sourced loans), or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the minimum, the recommendations of the Report may be conditioned upon an increase in the debt service and the Underwriter may make adjustments to the requested financing structure in the order presented in subclauses (I) and (II) of this clause. If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include:

(i) documentation with terms for project-based rental assistance or operating subsidy;

(ii) a fully executed management contract with clear terms;

(iii) documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this subchapter.

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in

the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team or permanent lender:

(I) is the current owner in whole or in part of the proposed property, or

(II) was the owner in whole or in part of the proposed property during any period within the 36 months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide subclauses (I) and (II) of this clause:

(I) the original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner, and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application,

(-a-) an appraisal that meets the requirements of §1.34 of this subchapter, and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iii) in no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter. The Underwriter will prorate the actual sales price or identity of interest adjusted sales price based upon a calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form.

(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §50.9(h)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party cost estimating data source and historical final cost certifications of all previous Housing Tax Credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or equivalent other comparable published third-party data source, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located, or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located.

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule, the Underwriter may request a supplement executed by the PCA provider reconciling the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant's project cost schedule including any soft cost contingency will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 5% of direct

costs plus site work for new construction Developments and 10% of direct costs plus site work for rehabilitation Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited at a total of 14%. The percentage is applied to the sum of the direct construction costs plus site work costs. For tax credit Developments, the percentages are applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible construction costs but will be ineligible for tax credit basis purposes.

(7) Developer Fee. Developer fee claimed must be adjusted by the same applicable percentage from which it is calculated and consistent with §50.9(d)(6) of this title. Additional fees for ineligible costs will be limited to the same percentage of ineligible development costs but will be ineligible for tax credit basis purposes. All fees to related parties to the owner or developer for work determined by the Underwriter to be typically completed by the developer will be considered part of the Developer fee claimed.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits:

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less; and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses less management fees and reserve for replacements plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the conventional lender or syndicator if the detail for such greater amount is well documented in the conventional lender or syndicator commitment letter.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Applicant, General Partner, Developer, anticipated Guarantor or Principals thereof have a credit score which reflects a 40% or higher potential default rate.

(2) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information in accordance with the Department's program rules.

(A) Individuals. The Underwriter will evaluate and discuss financial statements for individuals in a confidential portion of the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(B) Partnerships and Corporations. The Underwriter will evaluate and discuss financial statements for partnerships and corporations in the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(C) If the Development is characterized as a high risk for either lack of previous experience as determined by the TDHCA division responsible for compliance or a higher potential default rate is identified as described in paragraph (1) or (2) of this subsection, the Report must condition any potential award upon the identification and inclusion of additional Development partners who can meet the Department's guidelines.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development.

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter.

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities.

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Inclusive Capture Rate. The method for determining the inclusive capture rate for a Development is defined in §1.33(d)(10)(E) of this subchapter. The Underwriter will independently verify all components and conclusions of the inclusive capture rate and may at their discretion use independently acquired demographic data to calculate demand. The Development:

(A) is characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 75% for the total proposed units; or

(B) is not characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 25% for the total proposed units.

(C) Developments meeting the requirements of subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this subchapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 80% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Deferred Developer Fee. Developments requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first fifteen (15) years of the long term proforma as described in subsection (d)(5) of this section.

(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriting recommendation that all restricted units have rents and incomes restricted at or below the 50% of AMGI level.

(4) Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 65%.

(5) Long Term Feasibility. Any year in the first fifteen (15) years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects:

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) Exceptions. The infeasibility conclusions may be excepted where either of the following apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance for at least 50% of the units and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) The Development will receive rental assistance for at least 50% of the units in association with USDA-RD-RHS financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50% of the units.

(iv) The Development will be characterized as Supportive Housing for at least 50% of the units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50% of the units that allow rents to increase based upon expenses and those rents are currently more than 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055). The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing in the State of Texas.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 250,000 people for Developments targeting families; and

(ii) boundaries based on:

(I) major roads;

(II) political boundaries; and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Secondary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the Secondary Market.

(C) A scaled distance map indicating the Secondary Market Area boundaries that clearly identifies the location of the subject Property must be included.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with:

(i) size based on a base year population of no more than 100,000 people; and

(ii) boundaries identifying the most recent Census Tract definitions, as established by the U.S. Census Bureau and based on:

(I) major roads;

(II) political boundaries; and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Primary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the PMA.

(C) A scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of all Local Amenities must be included.

(9) Market Information.

(A) For each of the defined market areas and all census tracts contained in whole or in part by that area, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable:

(i) total housing;

(ii) rental developments (all multi-family);

(iii) Affordable Housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Targeted Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Turnover. Turnover rates should be specific to the Targeted Population. The data supporting the turnover rate must originate from documented turnover rates from the most current Department data on the Department web site or the most current U.S. Census Bureau tenure appropriate data for movership rates over the last 12 months or next shortest term. The Market Analyst should use the more reasonable rate, supported by IREM (Institute for Real Estate Management) or independent surveys conducted by the Market Analyst and which is subject to review by the Underwriter.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to elderly population for an elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the following they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five-year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by

number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up).

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 50% for Qualified Elderly households, and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up) or one person for efficiency units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Demand from Turnover. Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the PMA projected at the proposed placed in service date.

(iii) Demand from Home Ownership Turnover for Qualified Elderly Developments. Apply the turnover rate as described in subparagraph (D) of this paragraph, but not greater than 10%, to the target, income-eligible, size-appropriate and owner households in the PMA projected at the proposed placed in service date.

(iv) Demand from Population Growth. Calculate the target, income-eligible, size-appropriate and tenure-appropriate household growth in the PMA for the twelve month period following the proposed placed in service date.

(v) Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Not more than 25% of the demand can come from outside the PMA as calculated in subclause (I) of this clause and be included in the calculation of demand as described in paragraph (10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(vi) Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (G) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate Market Rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter.

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of:

(I) Development name;

(II) address;

(III) year of construction and year of rehabilitation, if applicable;

(IV) property condition;

(V) population target;

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage; and

(-a-) monthly rent and utility allowance; or

(-b-) sales price with terms, marketing period and date of sale;

(VII) description of concessions;

(VIII) list of unit amenities;

(IX) utility structure;

(X) list of common amenities; and

(XI) for rental developments only:

(-a-) occupancy; and

(-b-) turnover.

(ii) Provide a scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of the identified developments with Comparable Units.

(iii) Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(I) The Department recommends use of HUD Form 92273.

(II) A minimum of three developments must be represented on each attribute adjustment matrix.

(III) Adjustments for concessions must be included, if applicable.

(IV) Total adjustments in excess of 15% must be supported with additional narrative.

(V) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand. State the target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit type

by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI) by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection. State the total target, income-eligible, size-appropriate and tenure-appropriate household demand by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection.

(E) Inclusive Capture Rate. The Market Analyst must calculate inclusive capture rates for the subject Development's proposed Unit types by number of Bedrooms and rent restriction categories, market rate Units, if applicable, and total Units. The Underwriter will adjust the inclusive capture rates to take into account any errors or omissions. To calculate an inclusive capture rate:

(i) total:

(I) the proposed subject Units;

(II) Comparable Units with priority, as defined in §50.9(d)(2) of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision; and

(III) Comparable Units in previously approved but Unstabilized Developments; and

(ii) divide by the total target, income-eligible, size-appropriate and tenure-appropriate household demand stated in subparagraph (D) of this paragraph.

(iii) Refer to §1.32(i) of this subchapter for feasibility criteria.

(F) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(G) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market (§2306.67055).

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806477
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

♦ ♦ ♦

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 304. WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §304.2

The Texas Residential Construction Commission (commission) adopts amendments to 10 TAC §304.2, concerning General Provisions Applicable to all Residential Construction for New Homes, Material Improvements and Interior Renovations without changes to the proposed text as published in the September 26, 2008, issue to the *Texas Register* (33 TexReg 8107).

These amendments revise the time for a homeowner to provide notice of an alleged defect so that it complies with changes in the time for filing an inspection request made by House Bill 1038 (Act effective Sept., 1, 2007, 80th Legislature, Regular Session).

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act, §426.001 and §426.006, which provide the time for filing a request with the commission, and §430.001, which requires the commission to adopt building and performance standards for residential construction.

No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806457
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 1, 2009
Proposal publication date: September 26, 2008
For further information, please call: (512) 463-3926

♦ ♦ ♦

CHAPTER 305. PRACTICES AND PROCEDURES FOR HEARINGS AND DISCIPLINARY ACTIONS

SUBCHAPTER B. DISCIPLINARY PROCEEDINGS

10 TAC §305.21

The Texas Residential Construction Commission (commission) adopts amendments to 10 TAC §305.21, concerning the practices and procedures for hearings and disciplinary actions, without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7952).

The amendments provide that a builder/remodeler or third-party warranty company's registration may be administratively withdrawn if the payment of a registration or renewal fee is returned due to insufficient funds or overdraft, which the applicant fails to correct within a reasonable time period.

The commission received no comments on the proposed amendments.

The amendments are adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act, and §§416.005, 416.006, and 416.008, regarding the issuance of registration certificates, eligibility requirements, and denial of registration applications by the commission.

No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806458
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 1, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 463-3926

♦ ♦ ♦

SUBCHAPTER C. PROCEEDINGS AT SOAH

10 TAC §305.32

The Texas Residential Construction Commission (commission) adopts amendments to 10 TAC §305.32 concerning Default Proceedings without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7953).

The amendments will streamline the default process when the respondent has not responded to the initial Notice of Violation.

The commission received no comments on the proposed amendments.

The amendment is adopted pursuant to Texas Property Code §408.001, and Texas Government Code §§2001.051, 2001.054 and 2001.056, regarding notice and opportunity for hearing of contested cases, use of contested case procedures for licensing and informal disposition of a contested case, including the use of default.

No other statutes, articles, or codes are affected by the adoptions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806456
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 1, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 463-3926

♦ ♦ ♦

CHAPTER 307. INSPECTIONS OF HOMES IN AREAS WITHOUT MUNICIPAL INSPECTIONS

10 TAC §307.4

The Texas Residential Construction Commission adopts the amendments to 10 TAC §307.4, concerning reporting requirements for inspections of residential construction in areas not subject to municipal inspections without changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7954).

The adopted amendment corrects a typographical error and clarifies the name of the certificate of compliance that must be submitted when a builder or remodeler registers a home with the commission and when the builder or remodeler is required by statute or rule to obtain a windstorm WPI-8 certificate of compliance in accordance with the requirements of Insurance Code §2210.251. The adopted amendment implements new legislation enacted during the 80th Legislative Session, Regular Session, House Bill 1038 (Act effective September 1, 2007, 80th Legislature, Regular Session), which includes changes to Title 16, Property Code.

The commission received no comments on the proposed amendments.

The amendment is adopted pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 of the Property Code; Property Code §446.001, which gives the commission the authority to inspect homes in unincorporated areas and the commission's enabling act; and the Administrative Procedures Act, Texas Government Code, Chapter 2001.

No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806459

Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 1, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 463-3926

♦ ♦ ♦

CHAPTER 313. STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS (SIRP)

10 TAC §313.16, §313.20

The Texas Residential Construction Commission (commission) adopts amendments to 10 TAC §313.16, concerning the third-party inspector's report, and §313.20, concerning the appeal process. Section 313.16 is adopted without changes to the text as published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8709). Section 313.20 is adopted with changes to the text, as discussed below.

Adoption of the amendments is needed to streamline the State-Sponsored Inspection and Dispute Resolution Process (SIRP) in an effort to reduce the time it takes to complete the process from filing to final report.

The amendments to 10 TAC §313.16 provide incentive to third-party inspectors to file completed reports within applicable deadlines and clarify that third-party inspectors must return all materials to the commission along with the submission of the inspection report. The amendments to 10 TAC §313.20 require that SIRP appeals be submitted on the commission's appeal form, identify the subject of the appeal, provide the ground or grounds for lodging the appeal, and state the performance standard or method or repair the builder/remodeler asserts is correct when appealing on those grounds.

The Commission received comments from the Texas Association of Builders (TAB) regarding the amendments proposed to §313.20.

As proposed, 10 TAC §313.20(b) provides that a builder or remodeler who submits an appeal to a third-party inspector's report that did not make a good faith offer of repair to a homeowner prior to the filing of the request for inspection must submit a payment with the appeal form, as a deposit for the cost of the inspection.

TAB commented that 10 TAC §313.20(b) should state, "A builder or remodeler submitting an appeal to a third-party inspector's report that did not, before the inspection, offer to make repairs or have repairs made substantially equivalent to those required by the findings of the final report confirming the defect must submit a payment of $150 with the appeal form, as a deposit for the cost of the inspection."

The commission agrees with TAB's comments that omission of the term "good faith" provides greater clarity and that TAB's alternative wording more closely follows the requirements of Property Code §428.004. Therefore, in response to TAB's comments, the commission modifies its rule.

As proposed, 10 TAC §313.20(c) provides that a builder or remodeler who asserts on appeal that the third-party inspector applied the wrong performance standard in determining whether the allegedly defective item was conforming must state in the appeal the standard that the builder or remodeler asserts is correct and that failure to assert the applicable standard invalidates the appeal on that ground for the item appealed.

TAB commented that 10 TAC §313.20(c) should be applied equally to both homeowners and builders. In support of its position, TAB referenced the section as it existed and §313.20(b), which the commission applied to both homeowners and builders. TAB proposed alternative language to hold homeowners and builders to the same standard, requiring both parties to provide the applicable performance standards when asserting an appeal on the ground that the third-party inspector applied the wrong standard.

The commission declines to modify its rule in response to TAB's comments. The commission's intent was not to apply 10 TAC §313.20(c) to homeowners and builders in the same manner. Homeowners do not usually have expertise regarding the performance standards applicable to the construction of the home. On the other hand, builders and remodelers are required to know the performance standards applicable to the home they are constructing or remodeling. While the builder or remodeler should know the applicable performance standards, the homeowner may not. No modification to the proposed rule subsection is necessary in response to the comment received.

As proposed, 10 TAC §313.20(d) addresses appeals made on the grounds that the third-party inspector's repair recommendation of a defect is unreasonable and requires the builder or remodeler to assert the method of repair that is reasonable.

TAB commented that 10 TAC §313.20(d) should apply equally to both the builder and the homeowner. The commission agrees with TAB that both the builder and the homeowner may have ideas for remedying defects and that the requirement to explain why a repair recommendation is not reasonable should apply to both parties.

TAB also commented that 10 TAC §313.20(d) should not apply if the basis of the builder or remodeler's appeal of an item is that no defect exists and, therefore, no repair is required. The commission considered TAB's comment and acknowledges that, as proposed, the amendment to §313.20(d) would apply when the builder or remodeler concurs that there is a defect but disagrees with the third-party inspector's repair recommendation. The commission declines TAB's recommendation that, in the absence of an explanation, the commission may assume the reason for the builder or remodeler's appeal was that no defect exists. Nevertheless, TAB's comment has merit and it is not the intent of the commission to automatically invalidate an appeal that has legitimate basis of consideration.

Therefore, in response to TAB's comments, the commission modifies the text to afford the builder or remodeler an opportunity to provide adequate, written explanation, including the basis of the of the appeal, the flaw in the third-party's assessment of the existence of a defect, why no defect exists, the reason the repair recommendation is unreasonable, and the method of repair that the builder or remodeler asserts is reasonable. Failure of the builder or remodeler to provide such information or explanation will invalidate the appeal on that ground for the item appealed. The commission adopts 10 TAC §313.20(d), as follows:

(d) A homeowner or builder or remodeler that asserts on appeal that the third-party inspector's recommendation for repair for an item found to be defective is unreasonable must state the method of repair that the homeowner, builder or remodeler asserts is reasonable. Failure to state the method of repair that the homeowner or builder or remodeler asserts is reasonable under

this subsection will invalidate the appeal on that ground for the item appealed. If the basis of the builder or remodeler's appeal is that no defect exists and therefore no repair is required, the builder or remodeler must explain why the third-party inspector's finding of the existence of a defect is incorrect, why no defect exists, and thus no method of repair would be reasonable.

As proposed, 10 TAC §313.20(g) extends the authoritative documents upon which the appeal panel may rely to include public sources, manufacturers' websites, and published authorities on construction techniques.

TAB cautioned the commission on the unintended consequences that may arise from the proposed amendment, stating that many public sources of information are disreputable or incorrect. TAB recommended that the term "public source" become "reputable source" and that "published authority" become "reputable published authority."

The commission shares TAB's concerns that decisions by the appellate panel should not be based upon inaccurate or misleading information. In response to TAB's comment, the commission modifies the rule to add the word "reputable" but declines to omit the term "public," especially as that term applies to public records and public documents. The commission adopts 10 TAC §313.20(g), with the following changes in response to TAB's comments:

(g) Information submitted with the appeal by either party that was not provided to the third-party inspector for his consideration when preparing his report or that is not readily available to the appeal panel from a reputable public source, such as a manufacturer's website or reputable published authority, will not be provided to or considered by the appellate panel.

The commission adopts the amendments under Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code. The commission adopts the amendments to implement Subtitle D, Title 16 of the Property Code, specifically Chapters 428 and 429 which describe the state inspection process, the third-party inspector's report, and the appeal of that report.

The statutory provisions affected by the amendments are set forth in Title 16, Property Code §§408.001, 428.003, 428.004, and 429.001. No other statutes, articles, or codes are affected by the adoptions.

§313.20. Appeal Process.

(a) A homeowner or builder/remodeler that submits an appeal must submit the appeal on a commission-prescribed appeal form, and must identify the inspected item that is the subject of the appeal with the stated ground for appeal.

(b) A builder or remodeler submitting an appeal to a third-party inspector's report that did not, before the inspection, offer to make repairs or have repairs made substantially equivalent to those required by the findings of the final report confirming the defect make a good faith offer of repair to a homeowner prior to the filing of the request for inspection, must submit a payment of $150 with the appeal form, as a deposit for the cost of the inspection.

(1) A builder or remodeler's appeal received without payment or without evidence that an offer of repair as required under this subsection was made to the homeowner prior to the filing of the inspection request will not be considered timely filed, unless the payment or evidence of offer is received before the fifteenth day after the date of the commission's letter notifying the parties of their right to appeal.

(2) If the builder or remodeler's stated grounds for appeal are substantially affirmed in their entirety by the appeal panel, the $150 fee paid will be deducted from any amount due by the builder or remodeler for reimbursement of the inspection fee pursuant to §313.18 of this chapter, or if none of the allegedly defective items subject to inspection are finally determined by a final non-appealable report issued by the commission to be construction defects, the $150 fee will be refunded.

(c) A builder or remodeler that asserts on appeal that the third-party inspector applied the wrong performance standard in determining whether the allegedly defective item was conforming must state in its appeal the standard that the builder or remodeler asserts is correct. Failure to assert the applicable standard under this subsection will invalidate the appeal on that ground for the item appealed.

(d) A homeowner or builder or remodeler that asserts on appeal that the third-party inspector's recommendation for repair for an item found to be defective is unreasonable must state the method of repair that the builder or remodeler asserts is reasonable. Failure to state the method of repair that the homeowner or builder or remodeler asserts is reasonable under this subsection will invalidate the appeal on that ground for the item appealed. If the basis of the builder or remodeler's appeal is that no defect exists and therefore no repair is required, the builder or remodeler must explain, in detail, why the third-party inspector's assessment of the existence of a defect is incorrect, why no defect exists, and why there is no alternative method of repair that would be reasonable.

(e) Upon receipt of an appeal from either party, the commission shall refer the appeal to a three-person panel of state inspectors. If the request includes a structural matter, one of the panel members shall be a licensed professional engineer.

(f) The appellate panel shall conduct a review of the third-party inspector's report and recommendations for compliance with the Act and the written documents and tangible things considered by the third-party inspector in making the findings and recommendations, including but not limited to materials submitted with the request, any information or data gathered by the third-party inspector and documentation or tangible things provided to the third-party inspector by one of the parties during the SIRP and prior to the issuance of the report.

(g) Information submitted with the appeal by either party that was not provided to the third-party inspector for his consideration when preparing his report or that is not readily available to the appeal panel from a reputable public source, such as a manufacturer's website or reputable published authority, will not be provided to or considered by the appellate panel.

(h) The appellate panel shall make written findings of fact and shall affirm, reverse or modify the findings regarding the applicable warranties and performance standards and recommendations of repair of the third-party inspector or shall recommend that the matter be remanded to the third-party inspector for further action as directed by the appellate panel.

(i) The appellate panel shall file a written report of its findings and recommendations with the commission not later than the 25th day after the expiration of the time to appeal the third-party inspection report under §313.19 of this chapter.

(j) The commission shall transmit the appellate panel's rulings to the parties to the appeal not later than the fifth day after receipt of the appellate panel's rulings.

(k) The commission shall return the report to the appointed third-party inspector for a response to any issue remanded by the appellate panel. The third-party inspector will issue a report on any re-

manded items and return the report to the appellate panel in accordance with §313.17 of this chapter.

(l) A ruling by an appellate panel under this section is a final agency decision not subject to further administrative appeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806460
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: January 1, 2009
Proposal publication date: October 24, 2008
For further information, please call: (512) 463-3926

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 211. GENERAL PROVISIONS

22 TAC §211.6

The Texas Board of Nursing (BON) adopts an amendment to 22 TAC §211.6, pertaining to Committees of the Board, without changes to the proposed text as published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9190) and will not be republished.

The amendment adds language to the foregoing rule reflecting the establishment of the Eligibility and Disciplinary Advisory Committee (EDAC), formerly known as the Eligibility and Disciplinary Committee Task Force. When the Task Force was created, its purpose was to develop recommendations for the Board concerning matters of licensure, eligibility, and discipline. The designation of "Task Force" has served to describe the committee as potentially limited in duration. This committee has proved a very valuable asset in obtaining stakeholder input regarding matters of eligibility and discipline and has served to educate stakeholders as to the unique value of the Board in the protection of public health and welfare through its decisions regarding eligibility and discipline. The Task Force has been re-designated as a standing "Advisory Committee," which is to be utilized to give analysis and advise the Board regarding regulatory matters, with continuing duration.

No comments were received regarding adoption of the rule.

The amendment is adopted pursuant to the authority of Texas Occupations Code §301.151 which authorizes the Texas Board of Nursing to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806497
James W. Johnston
General Counsel
Texas Board of Nursing
Effective date: January 4, 2009
Proposal publication date: November 14, 2008
For further information, please call: (512) 305-6811

♦ ♦ ♦

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.16

The Texas Board of Nursing (BON) adopts amendments to 22 TAC §217.16, relating to Minor Incidents, without changes to the proposed text as published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9191) and will not be republished.

The amendments will provide clarification and consistency in the Board's current "minor incident" rule with the board's nursing peer review rules located at 22 TAC §217.19 and §217.20, relating to Incident-Based and Safe Harbor Nursing Peer Review respectively. This adopted rule regarding minor incidents will help with the implementation of the previously adopted nursing peer review rules that became effective May 11, 2008, as published in the October 10, 2008, issue of the *Texas Register* (33 TexReg 8512). These rules were revised in response to Senate Bill 993 and House Bill 2426 (80th Regular Texas Legislative Session, 2007).

The minor incident rule was last amended in May of 2006 and has been in existence since 1994. As is stated in current rule language, the board does not believe the protection of the public is enhanced by the reporting of every minor incident that may be a violation of the Texas Nursing Practice Act. The intent of the Minor Incident rule is to provide guidance to nurses, nursing peer review committees, nursing supervisors and others who may have a duty to report in determining whether a nurse has engaged in conduct that indicates the nurse's continued practice would pose a risk of harm to patients or others that cannot be remediated or that is otherwise required to be reported to the board.

The adopted rule also adds guidance for implementing amended §301.410(b) of the Nursing Practice Act which now requires a report to the board when a person believes a nurse has committed a practice violation in conjunction with the belief that the nurse may concurrently be impaired by chemical dependency or any condition that results in the nurse experiencing a diminished mental capacity.

The rule seeks to implement additional changes recommended by the BON's Nursing Practice Advisory Committee (NPAC) which were adopted by the Board to clarify language regarding conduct that requires a report to the board and conduct that typically does not require a report to the board. Given that nurses are frequently in attendance when a patient expires, the adopted language also provides guidance to peer review committees when they are asked to evaluated nursing actions associated with a death or serious injury. The rule is designed to ensure that the peer review documents the committee's rationale in coming to this determination when death or serious injury to a patient is present.

No comments were received regarding adoption of the rule.

The amendment is adopted pursuant to the authority of Texas Occupations Code §301.151 which authorizes the Board of Nursing to adopt, enforce, repeal, and amend rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 15, 2008.

TRD-200806498
James W. Johnston
General Counsel
Texas Board of Nursing
Effective date: January 4, 2009
Proposal publication date: November 14, 2008
For further information, please call: (512) 305-6811

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER H. MASSAGE THERAPISTS

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §§140.300 - 140.307, 140.310 - 140.315, 140.320 - 140.324, 140.330 - 140.351, 140.360 - 140.365, and 140.370 - 140.376, concerning the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments. New §140.313 is adopted with changes to the proposed text as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7664). Sections 140.300 - 140.307, 140.310 - 140.312, 140.314, 140.315, 140.320 - 140.324, 140.330 - 140.351, 140.360 - 140.365, and 140.370 - 140.376 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 and new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and include substantive changes to implement portions of House Bill (HB) 2644, 80th Legislature, Regular Session (2007), which amended Occupations Code, Chapter 455, as well as other changes to update, strengthen, and clarify the rules.

Changes which implement HB 2644 include an increase in the minimum educational standard for a massage therapist license from 300 to a minimum of 500 hours and extensive corresponding changes and clarifications to the requirements for licensed massage schools; elimination of the requirement for a practical examination; elimination of the independent massage therapy instructor license; elimination of language relating to licensure of unlicensed applicants from another state where licensure is not available; new language relating to examinations; and new language which mirrors the statute relating to exemptions from licensure for certain massage establishments.

Additional changes include the approval of online and correspondence courses in non-massage therapy technique subjects for continuing education credit, a requirement that a licensee to honor or refund an unexpired gift certificate, a new requirement that a massage establishment maintain additional records, including a list of current employees and contractors along with proof of eligibility to work in the United States at all times and provide it to the department upon request, and a new requirement for a jurisprudence examination for new applicants for a license as a massage therapist, massage establishment, or preapproved continuing education provider starting in 2009.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the rules are repealed and adopted in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.300 includes definitions for terms used within the rules, including new subject areas taught by massage schools, massage therapist, and what constitutes compensation. New §140.301 lists the fees required for new applications, renewals and late renewals, license and identification card replacements, returned checks, and name changes for all license types. The new reduced fee for massage schools which must now also hold a massage establishment license is included. New §140.302 provides timelines for the processing of initial and renewal applications, and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.303 sets forth general ethical standards and imposes a new requirement that licensees not make false or misleading claims about their services, their qualifications, or the field of massage therapy. New §140.304 is a new section with existing language which describes and emphasizes the required consultation document. New §140.305 sets forth prohibitions on sexual misconduct. New language also explicitly prohibits misconduct by a student, forbids kissing, and requires that female clients consent in writing before breast massage may be performed. New §140.306 establishes standards for advertising. New language requires a massage establishment to include their license number in all advertising, and clarifies that a student's endorsement of a school as defined by rule does not constitute a prohibited testimonial. New §140.307 provides for the issuance of license certificates. New §140.310 describes application procedures and lists qualifications for a license as a massage therapist. It includes the new requirement for a minimum 500-hour course of instruction for initial licensure. It eliminates a prior requirement for a massage therapist licensed in another state with substantially equivalent requirements to have held that license for two years prior to applying for a Texas license. New §140.311 sets forth application procedures and documentation requirements for licensure as a massage therapist. New §140.312 describes application procedures and lists qualifications for a

provisional license as a massage therapist. New §140.313 sets forth the examination requirements for licensure as a massage therapist. It includes new language related to the national and the jurisprudence examinations and the requirements during the transitional period prior to the effective date of the new requirement. Language related to oral interpretation of the examination into other languages is being eliminated. New §140.314 includes information concerning massage therapist license renewal and late renewal. New §140.315 includes information on renewal procedures for a licensed massage therapist on active military duty. New §140.320 sets forth the number of hours of continuing education required for renewal of a massage therapist license. New §140.321 sets forth standards for acceptable continuing education. New language is included to allow any subject taught in the expanded minimum 500-hour course of instruction to be accepted as continuing education, to allow online continuing education in non-technique subject areas, and to accept continuing education taken out of state which has been pre-approved by the national certification board. It limits the amount of continuing education credit allowed for CPR and/or First Aid certification to a total of six hours each renewal period and requires CPR and First Aid instructors to be appropriately certified. New §140.322 sets limits on unacceptable continuing education. New §140.323 provides for approval of continuing education providers. New language requires that all subjects taught be included on continuing education certificates, and establishes a new requirement for pre-approved providers to pass the jurisprudence examination. New §140.324 sets forth procedures for reporting continuing education. New §140.330 includes general provisions related to massage schools, including inspections. New language allows a maximum of two years, rather than one year, before an unannounced inspection of a massage school is required, in order to match the two-year renewal term. New §140.331 describes application procedures and lists qualifications for a license as a massage school. New §140.332 concerns massage school administrative personnel. New §140.333 concerns massage school instructors. New language increases the experience requirement for initial licensure from 250 hours to 500 hours of massage. New language requires CPR and First Aid instructors to be appropriately certified. New §140.334 sets out standards for financial stability for massage schools. New §140.335 relates to procedures for a change in massage school ownership. New §140.336 includes information concerning massage school license renewal and late renewal. New §140.337 concerns massage school locations. New language is included to allow an emergency approval for a change of instructional location due to circumstances beyond the control of the massage school. New §140.338 sets out updated standards for the massage school curriculum and internship. New language sets forth standards for the department to approve and for a school to offer up to twice the minimum 500 hours of instruction required for licensure provided a student is given notice that the program exceeds the minimum number of hours required for licensure and is offered a choice of a minimum 500 hour or a longer program; allows a student to begin internship after completing a minimum of 250 hours of internship, including at least 100 hours of massage therapy; limits the internship to a maximum of 120 hours; and emphasizes that a school may not require or allow a student to complete instruction hours for compensation. New §140.339 authorizes massage schools to offer advanced course work. New language emphasizes that the massage school may not represent that these advanced programs are approved by the department, and that the massage school may not allow unlicensed persons to provide massage therapy to the public. New §140.340 relates to massage school admission requirements. New language requires schools to keep proof of CPR and/or First Aid certification if accepted for credit of up to six hours. New §140.341 includes massage school enrollment procedures. New §140.342 concerns massage school tuition and fees. New language emphasizes that a massage school may not allow a student to engage in the unlicensed practice of massage in order to pay for school expenses. New §140.343 relates to the requirement for a massage school conduct policy. New §140.344 establishes standards for massage school cancellation and refund policies. New §140.345 sets forth standards for massage school minimum progress standards. New §140.346 relates to massage school attendance standards. New §140.347 sets forth massage school equipment and facility requirements. New §140.348 relates to massage school transcripts and records. New language requires a licensee to provide a transcript to a student who has satisfied the terms of his/her enrollment agreement within 10 calendar days. New language also requires that the student authorize the release of transcripts. New §140.349 requires a massage school to establish and adhere to a grievance policy. New language is added to forbid a massage school from retaliating against a student who files a complaint with the department. New §140.350 relates to fire safety for massage schools. New §140.351 sets forth standards for massage school sanitation. New §140.360 concerns application and licensure procedures for massage establishments. New language requires establishments to submit a list of all establishment owners, directors, managers, employees and contractors, and their birth dates for all persons associated with the establishment, to the department, and establishes a new requirement for massage establishment owners to pass the jurisprudence examination. New §140.361 sets forth general requirements for massage establishments. New language requires establishments to maintain specific documents, including proof of eligibility to work in the United States for all employees or contractors providing massage therapy or other massage services. New language also requires the establishment to maintain a current list of all establishment employees and contractors, to maintain all previous lists for a period of two years, and to provide the list to the department upon request. New language also forbids kissing and requires that female clients consent in writing before breast massage may be performed. New §140.362 sets forth standards for massage establishment sanitation. New §140.363 relates to massage establishment license renewal. New language requires establishments to submit proof of a current fire inspection at each renewal. New §140.364 contains all new language which reiterates the new language in the statute limiting the exemptions for licensure as a massage establishment. New §140.365 concerns massage establishment change or ownership or change of location. New §140.370 sets forth procedures for filing complaints. New §140.371 concerns the investigation of complaints. New §140.372 sets for the grounds for denial of a license and disciplinary action. New §140.373 relates to formal hearings. New §140.374 sets forth procedures for suspension of a license for failure to pay child support. New §140.375 relates to informal disposition. New §140.376 sets forth standards for the licensing of persons with a criminal background.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the com-

mission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: the Texas Association of Massage Therapists, the Texas Association of Massage School Owners (TAMSO), the American Massage Therapy Association - Texas Chapter, and sixteen individuals. Some of the commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments. Four commenters opposed adoption of the rules in their entirety, and also suggested recommendations for change as discussed in the summary of comments.

Comment: Ten commenters expressed support for the proposed rules as published in their entirety.

Response: No change was made to the rules as a result of the comments.

Comment: Four commenters opposed adoption of the proposed rules in their entirety.

Response: The commission disagrees with the comments opposing the rules in their entirety, as the proposed rules are necessary to implement recent legislation and to comply with the rule review required by Government Code, §2001.039. No change was made to the rules as a result of the comments.

Comment: Concerning §140.303, one commenter requested that massage schools be prohibited from any advertising or labeling any course with the word "certification."

Response: The commission disagrees with the comment. The proposed rule already contains specific language at §140.303(s)(2) which prohibits misrepresentation by a licensee regarding the licensee's services, including any false, misleading, deceptive, fraudulent, or exaggerated claim or statement about "certification." No change was made to the rule as a result of this comment.

Comment: Concerning §140.304(a)(4), three commenters requested that the rule be amended to mandate draping during massage therapy sessions.

Response: The commission believes that additional input from licensed massage therapists currently practicing in Texas would be required prior to proposing this change to the current scope of practice for massage therapists. The commission will retain the comment and consider it during future rulemaking proceedings. No change was made to the rule as the result of these comments.

Comment: Concerning §140.313(a), four commenters opposed the use of national examinations and requested that the department offer a state-specific examination for licensure.

Response: The commission disagrees because the use of national examinations for state licensure is consistent with the statute, the legislative intent of HB 2644 regarding portability, and current Sunset Commission recommendations. No change was made to the rule as a result of these comments.

Comment: Concerning §140.338(i), one commenter requested that the rule specify "a reasonable time."

Response: The commission disagrees because this wording is part of the rules currently in effect and has not occasioned complaints. No change was made to the rule as a result of this comment.

Comment: Concerning §140.338(j), five commenters opposed the limit on internship of 120 hours.

Response: The commission disagrees because the increase in the number of hours of internship from the previous limit of 50 hours to the new limit of 120 hours was developed through an extensive stakeholder process, is close to the median range for internships nationwide and allows more training for students. Significantly increasing or decreasing the number of hours would be a substantive change to the rules as proposed, and would require the department to withdraw and republish the rules as proposed rules for public comment. No change was made to the rules as a result of these comments.

Comment: Concerning §140.338(l), five commenters opposed the prohibition on schools allowing unlicensed students to partially or wholly fund their massage therapy education by providing massages to the public through extended internship programs.

Response: The commission disagrees. The rule at §140.338(m)(2)(D) distinguish between longer internships which are approved by the department to meet specific educational goals, and internships for the purpose of allowing an unlicensed student to "work off" massage school tuition. The statute prohibits the unlicensed practice of massage therapy for compensation. No change was made to the rule as a result of these comments.

Comment: Concerning §140.338(l), one commenter requested that the term "scholarships" be included as "compensation."

Response: The commission disagrees because many massage therapy students appropriately receive scholarships of various types. No change was made to the rule as a result of this comment.

Comment: Concerning §140.338(l), two commenters supported the prohibition on schools allowing unlicensed students to partially or wholly fund their massage therapy education by providing massages to the public through extended internship programs.

Response: The commission agrees. No change was made to the rule as a result of these comments.

Comment: Concerning §140.338(m), three commenters opposed the distinction in rule between department approval of programs, which exceed 500 hours offered by accredited and non-accredited licensed massage schools.

Response: The commission disagrees because the rule requires that all basic massage therapy educational programs, which exceed 500 hours receive approval from the department. The rule as proposed imposes a lower regulatory burden, and not less oversight, on accredited schools which have previously submitted their proposed programs to accrediting bodies approved by the federal Department of Education and received approval. No fee is required for the approval of any longer program, and no school is required to offer a program, which exceeds 500 hours. No change was made to the rules as a result of these comments.

Comment: Concerning §140.338(m), one commenter opposed the rules because the commenter stated that the rule would require accreditation in order to offer a program which exceeds 500 hours.

Response: The commission disagrees because the rule does not require a school to be accredited to offer a program, which exceeds 500 hours. No change was made to the rule as a result of this comment.

Comment: Concerning §140.338(m)(2), one commenter requested that the department review and approve extended programs prior to adoption of the rules so as to allow licensed massage schools to effectively market the programs.

Response: The commission agrees and has directed the department to ensure that schools are fully informed as to the requirements for approval of longer programs prior to the anticipated effective date of the rules. No change was made to the rule as a result of this comment.

Comment: Concerning §140.338(m)(2)(D), one commenter requested a clarification as to whether the rule as written would permit a 120 hour internship program with concentrations in hands-on spa and/or myofascial therapies could be approved without additional classroom hours.

Response: The commission is of the opinion that such a program could be approved under the rules as proposed. No change was made to the rules as a result of this comment.

Comment: Concerning §140.339(e), one commenter requested that the school be required to inform licensed massage therapists who enroll in advanced coursework, which includes internship that they will be "working for free."

Response: The commission disagrees because licensed massage therapists are not prohibited from accepting compensation for the provision of massage therapy during advanced internships. No change was made to the rule as a result of this comment.

Comment: Concerning §140.340(d), one commenter requested that the section be clarified to say whether the school must give a student credit if a student has completed all the hours and examinations required.

Response: The commission is of the opinion that the rule allows a student to enroll in a massage therapy educational program and complete only those hours the student lacks for licensure, but does not require that a school accept transfer students or give students credit for coursework completed elsewhere. Section 140.340(c) governs what documents are required for schools to enroll transfer students. No change was made to the rules as a result of this comment.

The department staff on behalf of the commission provided comments and the commission has reviewed and agrees to the following changes that will improve the implementation of the rules and accurately reflect changes made by policy in response to previous stakeholder input.

Concerning §140.313(a), the department has added language to clarify that the intent of the section is to permit the department to recognize examinations, which improve license portability.

Concerning §140.313(e), the department delayed the implementation date for the jurisprudence examination from January 1, 2009 until June 1, 2009 to be consistent with the implementation of required jurisprudence examinations for pre-approved massage therapy continuing education providers and massage establishment owners.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

DIVISION 1. THE DEPARTMENT

25 TAC §§140.300 - 140.302

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806483
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 2. CODE OF ETHICS

25 TAC §§140.303 - 140.307

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806484
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 3. MASSAGE THERAPISTS

25 TAC §§140.310 - 140.315

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§140.313. Examinations Required for Licensure as a Massage Therapist.

(a) All applicants must pass a massage therapy examination approved by the department prior to submitting an application for licensure unless applying under the transition language at subsection (d) of this section. Approved examinations must be broadly recognized for licensure purposes by other states that regulate massage therapists.

(b) Examination results must reflect that the applicant passed the examination within two years of the application for licensure unless the applicant is currently licensed in another state or jurisdiction and is applying under §140.310(a)(3) of this title (relating to Qualifications for Licensure as a Massage Therapist).

(c) A license will not be issued until the department receives confirmation deemed acceptable by the department of a passing examination score. This may include receipt of an electronic file containing examination scores.

(d) Transition. Until January 1, 2009, an applicant who completes a course meeting the requirements of §140.310(a)(1) of this title may submit a request to take the Texas state written examination provided the person complies with the requirements of this subsection.

(1) The department or its designee shall send an examination approval notice to each applicant who is eligible to sit for the written examination.

(2) Approved examination candidates must complete the examination registration process and submit the examination fee by the established deadlines. Forms which are received incomplete or late may cause the applicant to miss the examination deadline.

(3) The department shall void the application of any applicant who fails to schedule and take an examination within one year after the examination approval notice is mailed to the applicant. To be eligible for subsequent examination(s), the applicant will be required to file another application and meet requirements in effect at that time.

(4) The examination will be conducted in the English language. Exceptions will be made when English is not the native or first language of the applicant. The written exam may be taken in a person's native language if the person notifies the department at least 60 days in advance, so that the written test can be available. The applicant will be responsible for any fee or consideration to be paid to an acceptable interpreter and/or translator whose services are necessary for the examination.

(5) Applicants with disabilities must inform the department, in advance, of special accommodations requested for examination.

(6) Exam candidates must sign a statement agreeing to maintain the confidentiality of the exam.

(7) Examinations will be held on dates and in locations to be announced by the department.

(8) Examinations will be graded by the department or its designee. The department or its designee shall notify each examinee of the results of the examination within 30 calendar days of the date of the examination.

(9) A person who fails the written examination may retest by registering for another examination and paying another examination fee. The department will void the application of a person who fails to pass the written examination within one year of the initial approval for examination.

(10) No refunds will be made to examination candidates who fail to appear for an examination.

(e) Jurisprudence Examination. Effective June 1, 2009, all new applicants for licensure as a massage therapist must also pass the department's jurisprudence examination before a license will be issued.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806485
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 4. CONTINUING EDUCATION

25 TAC §§140.320 - 140.324

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806486

Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 5. MASSAGE SCHOOLS AND MASSAGE THERAPY INSTRUCTORS

25 TAC §§140.330 - 140.351

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806487
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 6. MASSAGE ESTABLISHMENTS

25 TAC §§140.360 - 140.365

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806488
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

DIVISION 7. COMPLAINTS, VIOLATIONS AND SUBSEQUENT DISCIPLINARY ACTIONS

25 TAC §§140.370 - 140.376

STATUTORY AUTHORITY

The new rules are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806489
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

CHAPTER 141. MASSAGE THERAPISTS

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66, concerning the licensing and regulation of massage therapists, massage therapy instructors, massage schools, and massage establishments, without changes to the proposal as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7689), and the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation, new §§140.300 - 140.307, 140.310 - 140.315, 140.320 - 140.324, 140.330 - 140.351, 140.360 - 140.365, and 140.370 - 140.376. The new rules transfer and update existing language, and include substantive changes to implement por-

tions of House Bill (HB) 2644, 80th Legislature, Regular Session (2007) which amended Occupations Code, Chapter 455, as well as other changes to update, strengthen, and clarify the rules.

Changes which implement HB 2644 include an increase in the minimum educational standard for a massage therapist license from 300 to a minimum of 500 hours and extensive corresponding changes and clarifications to the requirements for licensed massage schools; elimination of the requirement for a practical examination; elimination of the independent massage therapy instructor license; elimination of language relating to licensure of unlicensed applicants from another state where licensure is not available; new language relating to examinations; and new language which mirrors the statute relating to exemptions from licensure for certain massage establishments.

Additional changes include the approval of online and correspondence courses in non-massage therapy technique subjects for continuing education credit, a requirement that a licensee to honor or refund an unexpired gift certificate, a new requirement that a massage establishment maintain additional records, including a list of current employees and contractors along with proof of eligibility to work in the United States at all times and provide it to the department upon request, and a new requirement for a jurisprudence examination for new applicants for a license as a massage therapist, massage establishment, or preapproved continuing education provider starting in 2009.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the rules are repealed and adopted in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§141.1 - 141.3, 141.5 - 141.7, 141.10, 141.11, 141.13 - 141.17, 141.20 - 141.47, 141.50 - 141.55, and 141.60 - 141.66 is necessary to combine the Professional Licensing and Certification Unit rules in one chapter, 25 TAC Chapter 140, Health Professions Regulation.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed repeal during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. THE DEPARTMENT

25 TAC §§141.1 - 141.3

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806490
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER B. CODE OF ETHICS

25 TAC §§141.5 - 141.7

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806491
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER C. MASSAGE THERAPISTS

25 TAC §§141.10, 141.11, 141.13 - 141.17

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Exec-

utive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806492
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER D. CONTINUING EDUCATION REQUIREMENTS AND DOCUMENTATION

25 TAC §§141.20 - 141.25

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806493
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER E. MASSAGE SCHOOLS AND MASSAGE THERAPY INSTRUCTORS

25 TAC §§141.26 - 141.47

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806494
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER F. MASSAGE ESTABLISHMENTS

25 TAC §§141.50 - 141.55

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806495
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

SUBCHAPTER G. COMPLAINTS, VIOLATIONS AND SUBSEQUENT DISCIPLINARY ACTIONS

25 TAC §§141.60 - 141.66

STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §455.051, which authorizes the adoption of rules regarding massage therapists, massage therapy instructors, massage schools, and massage establishments; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806496
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2009
Proposal publication date: September 12, 2008
For further information, please call: (512) 458-7111 x6972

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

The Commissioner of Insurance adopts an amendment to §3.9103(b) and new Subchapter OO, §§3.9601 - 3.9606, concerning the use of the Ultimate 1980 CSO by insurance companies that issue preneed life insurance policies. The amendment and new sections are adopted without changes to the proposed text published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8885).

REASONED JUSTIFICATION. The adopted amendment to §3.9103(b) and new §§3.9601 - 3.9606 are necessary to permit life insurance companies to continue to use the Ultimate 1980 CSO for calculating minimum reserves and nonforfeiture values for preneed life insurance policies and certificates. The Ultimate CSO refers to the Commissioners 1980 Standard Ordinary Mortality Table without 10-year selection factors. It was incorporated into the National Association of Insurance Commissioners' Standard Valuation Law approved in December 1983. The amendment and new sections allow the Ultimate 1980 CSO to be used in determining the minimum standard of valuation of reserves and the minimum standard nonforfeiture values for preneed life insurance policies and certificates issued on or after January 1, 2009. Under existing §3.9103(b), life insurance companies are required to convert from using the Ultimate 1980 CSO to using only the 2001 CSO Mortality Table for life insurance policies, including preneed life insurance policies, issued on or after January 1, 2009. In 2004, the Society of Actuaries (SOA) commissioned a study of preneed mortality to examine preneed life insurance mortality based upon mortality experience data collected for the years 2000 - 2004. At that time, the 2001 CSO Mortality Table was recognized as the prevailing table for the purposes of calculating minimum reserves and nonforfeiture values for preneed life insurance policies, both on a statutory basis and on a tax basis. As a part of the SOA study, the research completed in 2008 by the Deloitte University of Connecticut Actuarial Center (Deloitte) determined that the 2001 CSO Mortality Table produced inadequate reserves for preneed life insurance policies. Based upon the Deloitte research, the National Association of Insurance Commissioners (NAIC) in March 2008 adopted the Preneed Life Insurance Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values Model Regulation (Preneed Mortality Model Regulation). This model regulation prescribes the Ultimate 1980 CSO as the appropriate mortality table to use in determining the minimum standard valuation of reserves and the minimum standard nonforfeiture values for preneed life insurance policies issued on or after January 1, 2009. The new sections and amendment are substantially similar to the Preneed Mortality Model Regulation.

The amendment to §3.9103(b) and new sections have two primary purposes. First, the amendment and new sections allow life insurance companies that issue preneed life insurance policies to continue to use the Ultimate 1980 CSO on and after January 1, 2009, to determine levels of reserve liabilities and nonforfeiture values relative to the expected mortality for these policies. This replaces the requirement in existing §3.9103(b) that insurers must use the 2001 CSO Mortality Table in determining minimum standards for these policies. Second, the amendment and new sections allow, but do not require, insurance companies to use the 2001 CSO Mortality Table as the minimum standard for reserves and minimum standard for nonforfeiture benefits for preneed life insurance policies or certificates issued on or after January 1, 2009, and before January 1, 2012. The amendment and new sections require insurers that opt to use the 2001 CSO Mortality Table for the January 1, 2009 - January 1, 2012 period to use the Ultimate 1980 CSO for all preneed life insurance policies issued on or after January 1, 2012. As demonstrated by the Deloitte study, the use of the Ultimate 1980 CSO by life insurance companies will produce more conservative reserves for preneed life insurance policies as opposed to the inadequate reserves produced using the 2001 CSO Mortality Table. Additionally, the amendment and new sections enable insurance companies currently using the Ultimate 1980 CSO to opt to continue to use that table as the minimum standard of mortality for reserves and nonforfeiture values for preneed life insurance policies issued on or after January 1, 2009. Existing §3.9103(b) requires life insurers to convert to the 2001 CSO Mortality Table by January 1, 2009. The amendment and new sections will result in a cost savings to these insurance companies in the amount they would have incurred to convert to the 2001 CSO Mortality Table.

HOW THE SECTIONS WILL FUNCTION. The adopted amendment to §3.9103(b) provides that the requirement that insurance companies use the 2001 CSO Mortality Table in determining minimum standards for policies issued on and after January 1, 2009, is subject to the requirements specified in adopted §§3.9601 - 3.9606. The adopted amendment to §3.9103(b) also updates Insurance Code references to be consistent with the nonsubstantive Insurance Code revision enacted by the Legislature. Adopted §3.9601 specifies the purpose and applicability of the subchapter. Adopted §3.9602 sets forth definitions used in the

subchapter. Adopted §3.9603 requires an insurance company to use the Ultimate 1980 CSO as the minimum mortality standard for determining reserve liabilities and nonforfeiture values for both male and female insureds for preneed life insurance policies issued on or after January 1, 2009, except as provided under adopted §3.9606. Adopted §3.9604 specifies the interest rates to be used in determining the minimum standard for valuation of reserves and the minimum standard nonforfeiture values for preneed life insurance. Adopted §3.9605 specifies the method used in determining the standard for the minimum valuation of reserves and minimum nonforfeiture values for preneed life insurance. Adopted §3.9606 provides insurance companies, if certain specified conditions are met, with the option to use the 2001 CSO Mortality Table in lieu of the Ultimate 1980 CSO as the minimum standard for determining reserve liabilities and nonforfeiture values for preneed life insurance policies issued on or after January 1, 2009, and before January 1, 2012. Adopted §3.9606 also requires insurance companies to use the Ultimate 1980 CSO in the calculation of minimum forfeiture values and minimum reserves for preneed life insurance policies issued on or after January 1, 2012.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: The single commenter expressed support for the adoption of the proposal. The commenter stated that both insurance companies and consumers will benefit from the adoption of the amendment and new sections.

Agency Response. The Department appreciates the comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: Funeral Directors Life Insurance Company.

Against: None.

SUBCHAPTER JJ. 2001 CSO MORTALITY TABLE

28 TAC §3.9103

STATUTORY AUTHORITY. The amendment is adopted under the Insurance Code §§425.058(c), 1105.055(h), and 36.001. Section 425.058(c) provides that for an ordinary life insurance policy issued on the standard basis, excluding any disability or accidental death benefits in the policy and to which Subchapter B, Chapter 1105, applies, the applicable mortality table is the Commissioners 1980 Standard Ordinary Mortality Table; at the insurer's option for one or more specified life insurance plans, the Commissioners 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; or any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard valuation for a policy to which this subdivision applies. Section 1105.055(h) provides that any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by rules adopted by the Commissioner for use in determining the minimum nonforfeiture standard may be substituted for the Commissioners 1980 Standard Ordinary Mortality Table with or without Ten-Year Select Mortality Factors. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2008.

TRD-200806406
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 29, 2008
Proposal publication date: October 31, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER OO. PRENEED LIFE INSURANCE MINIMUM MORTALITY STANDARDS FOR DETERMINING RESERVE LIABILITIES AND NONFORFEITURE VALUES

28 TAC §§3.9601 - 3.9606

STATUTORY AUTHORITY. The new sections are adopted under the Insurance Code §§425.058(c), 1105.055(h), and 36.001. Section 425.058(c) provides that for an ordinary life insurance policy issued on the standard basis, excluding any disability or accidental death benefits in the policy and to which Subchapter B, Chapter 1105, applies, the applicable mortality table is the Commissioners 1980 Standard Ordinary Mortality Table; at the insurer's option for one or more specified life insurance plans, the Commissioners 1980 Standard Ordinary Mortality Table with Ten-Year Select Mortality Factors; or any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by commissioner rule for use in determining the minimum standard valuation for a policy to which this subdivision applies. Section 1105.055(h) provides that any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by rules adopted by the Commissioner for use in determining the minimum nonforfeiture standard may be substituted for the Commissioners 1980 Standard Ordinary Mortality Table with or without Ten-Year Select Mortality Factors. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2008.

TRD-200806407
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 29, 2008
Proposal publication date: October 31, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 34. STATE FIRE MARSHAL
SUBCHAPTER L. FIRE STANDARD COMPLIANT CIGARETTES

28 TAC §§34.1201 - 34.1214

The Commissioner of Insurance adopts new Subchapter L, §§34.1201 - 34.1214, relating to fire standard compliant cigarettes. Sections 34.1201 - 34.1212 and 34.1214 are adopted with changes to the proposed text published in the October 24, 2008, issue of the *Texas Register* (33 TexReg 8714). Section 34.1213 is adopted without changes.

REASONED JUSTIFICATION. The new subchapter is necessary to implement the provisions of HB 2935, 80th Legislature, Regular Session, effective January 1, 2009. HB 2935 prescribes standards relating to fire standard compliant (FSC) cigarettes. FSC cigarettes are cigarettes which have a reduced propensity to continue burning when left unattended. In enacting HB 2935, the Legislature found that cigarettes are the leading cause of home fire fatalities in the United States, killing 700 to 900 people, smokers and nonsmokers alike, per year. According to the HB 2935 Senate bill analysis, many victims of smoking-material fire fatalities are not the smokers whose cigarettes started the fire: 34 percent are children of the smokers; 25 percent are neighbors or friends; 14 percent are spouses or partners; and 13 percent are parents. The Legislature found that there is technology available to produce a cigarette that has a reduced propensity to burn when left unattended. (Texas House Health & Human Services Committee, Bill Analysis (Senate Committee Report), HB 2935, 80th Legislature, Regular Session (June 15, 2007)). The purpose of HB 2935 is to reduce the number of fatalities resulting from fires caused by unattended cigarettes. All individuals and entities that sell or offer to sell a cigarette in Texas after January 1, 2009, will be subject to Chapter 796 of the Health and Safety Code and the rules adopted to implement Chapter 796. Section 796.008 of the Health and Safety Code authorizes the State Fire Marshal to adopt rules to administer Chapter 796. The new subchapter is adopted to administer the provisions of HB 2935. The subchapter addresses: (i) the purpose, applicability, and proper citation to the subchapter; (ii) definitions of terms used in the subchapter; (iii) cigarette manufacturers' general submission requirements of required and voluntary forms; (iv) existing cigarette inventories; (v) requirements relating to cigarette testing and alternative testing methods and performance standards; (vi) certification and changes to a certified cigarette; (vii) records maintenance; (viii) package marking; (ix) fees and forms; (x) penalties; and (xi) forfeiture of cigarettes.

On October 24, 2008, the proposed new subchapter was published in the *Texas Register*, and a public hearing on the rule was held on November 18, 2008. In response to comments received on the published proposal, the Department has revised some of the proposed text in the published rule. Additionally, this adoption includes minor clarification changes to several proposed provisions and to proposed Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette). None of the changes made to the proposed text, either as a result of comments or as a result of necessary clarification, materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The following changes are made to the proposed text as a result of comments. Section 34.1201 as adopted is changed to provide that the subchapter does not prohibit the sale of cigarettes solely for the purpose of cigarette assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette by using only the quantity that is reasonably necessary for the assessment. This change was requested by commenters who pointed out that this exception is specified in the Health and Safety Code §796.014.

The definition of "marking" in proposed §34.1202(7) has been changed in the adoption to delete the phrase "that has been approved by the State Fire Marshal's Office (SFMO)." Commenters requested the deletion of the phrase stating that the qualifying language is unnecessary and potentially confusing. According to the commenters, other portions of the subchapter discuss and distinguish "proposed markings" and "approved markings."

Section 34.1204(a) as adopted is revised to change the reference to the year "2008" in the proposal to "the previous year." Therefore, adopted §34.1204(a) reads in pertinent part: "Pursuant to Section 2(a) of HB 2935 enacted by the 80th Legislature and subject to subsection (b) of this section, this subchapter does not prohibit a wholesaler from selling existing inventory of cigarettes on or after January 1, 2009, provided . . . and the quantity is comparable to the quantity of cigarettes purchased during the previous year." A commenter requested that proposed §34.1204(a) be revised to conform to Section 2(a) of HB 2935, 80th Legislature. Section 2(a) uses the phrase "the previous year" in lieu of the year "2008."

Section 34.1205(c) as adopted has been changed to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). Adopted 34.1205(c) reads: "This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and this subchapter and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796." Proposed §34.1205(c) provided that the section did not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and the subchapter and have been subsequently altered only by changes to the brand or trade name or package description. This change resulted from commenters who recommended changing §34.1205(c) to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). Section 796.005(f) requires that a cigarette be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards. While the Department disagrees that proposed §34.1205(c) is inconsistent with the Health and Safety Code §796.005(f), there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8).

Section 34.1206(a)(1) as adopted provides that pursuant to §796.004 of the Health and Safety Code, a cigarette manufacturer may not certify a cigarette variety under the Health and Safety Code Chapter 796 and the adopted rules using a

cigarette testing method and performance standard other than the method specified in the Health and Safety Code §796.003 without the prior written authorization of the SFMO. The request to add the word "variety" to the certification requirement in proposed §34.1206(a)(1) was made by a commenter who noted that the testing and certification requirements in the Health and Safety Code apply to cigarette varieties, rather than cigarettes.

Section 34.1206(b) is changed to delete the phrase "or complaints concerning the cigarette variety." According to a commenter, the Health and Safety Code Chapter 796 does not have a provision specifying that a review of an alternative test method may be initiated based on complaints concerning the cigarette variety.

Section 34.1206(d)(1) as adopted does not require that a cigarette manufacturer demonstrate to the satisfaction of the SFMO that the alternative test method is equivalent to the performance standard specified in the Health and Safety Code §796.003. A commenter pointed out that the Health and Safety Code §796.004 requires only that the manufacturer demonstrate that the performance standard is equivalent to the statutory standard, but does not require that the alternative test method itself be equivalent to the statutory performance standard.

Section 34.1207 as adopted exempts retailers from the restrictions on selling a cigarette variety after the certification period for the cigarette has expired. This change is consistent with the statutory requirement in the Health and Safety Code §796.005(d), which applies only to manufacturers and not to wholesale dealers or retailers. Therefore, the following provision is added to adopted §34.1207(d): "(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period."

Proposed subsection (b) is deleted from §34.1208 as adopted because of the concern that there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). One commenter suggested revising proposed §34.1208(b), relating to cigarette alterations requiring retesting, to conform to the Health and Safety Code §796.005(f). Another commenter recommended deleting proposed §34.1208(b). Both commenters voiced concern that the proposed requirement in §34.1208(b) for cigarette retesting for alterations of any of the cigarette's physical characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) goes beyond the requirement in the Health and Safety Code §796.005(f) that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards. While the Department disagrees that the requirement in §34.1208(b) is inconsistent with the Health and Safety Code §796.005(f), there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8).

Section 34.1209(a) as adopted does not contain the record maintenance requirement specified in proposed §34.1209(a) that records be kept for three years after the expiration of the certification period. Instead, adopted §34.1209(a) requires manufacturers to retain testing records for all cigarettes offered for sale within the previous three years. According to one commenter, proposed §34.1209(a) is not consistent with the Health and Safety Code §796.007, which requires that manufacturers retain testing records for all cigarettes offered for sale within the previous three years.

Section 34.1209 as adopted does not contain the requirements to retain documents that are in addition to the documents required to be maintained by the Health and Safety Code §796.007. Proposed §34.1209(a) and (b) required manufacturer retention of copies of all cigarette tests, information demonstrating testing laboratory compliance with the requirements of the Health and Safety Code §796.003 or §796.004, and information relating to changes made to altered cigarettes. A commenter objected to the record maintenance requirements specified in proposed §34.1209(a) and (b) because the subsections require retention of documents in addition to the documents required to be maintained by the Health and Safety Code §796.007.

Section 34.1210(c) as adopted is revised to add a paragraph (2) to specify that the SFMO must approve: (i) a marking that is in use and approved for sale in another state or (ii) a marking that has the letters "FSC" for Fire Standard Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code. This addition was requested by a commenter who pointed out that this requirement is specified in the Health and Safety Code §796.006(b).

Section 34.1214 as adopted provides that pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette. A commenter suggested adding "under Chapter 154, Texas Tax Code" to proposed §34.1214 to be consistent with the Health and Safety Code §796.010(c).

Sections throughout the subchapter are revised to allow for manufacturers' use of alternate certification forms and marking applications. Section 34.1203(b)(2) as adopted specifies the applicable procedure for a manufacturer requesting to use an alternate certification form or marking application. Section 34.1212(c)(1) as adopted specifies that manufacturers may submit an alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit an alternate certification form and alternate marking application. Section 34.1212(c)(2) as adopted specifies that the alternate forms must be approved by the SFMO. Section 34.1203(c)(3) as adopted specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with §34.1203 as adopted. Section 34.1203(c)(4) as adopted specifies that a manufacturer may submit a request to use an alternate form in accordance with adopted §34.1203. Section 34.1212(c)(4) as adopted specifies that submission of an alternate form is not required and is at the option of the manufacturer. Additionally, §§34.1202(2), 34.1203(a)(1) and (2), 34.1203(b)(1) and (3)(A) and (3)(B), 34.1203(b)(4)(C)(i), 34.1207(a)(1)(B), 34.1207(d)(1), 34.1209(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (3), 34.1210(d), 34.1211(a), and the titles to §§34.1203 and 34.1212

as adopted address the filing of the alternate submission forms. The changes were made in response to comments recommending deletion of references throughout the proposed subchapter to a specific adopted form and amendment of language in numerous sections to allow for the submission of required information in alternate forms. Commenters stated that not adopting a specific form by rule allows the SFMO the flexibility to update and change the form without going through the rulemaking process. Commenters also asserted that it would be burdensome on manufacturers to submit the information required by the certification forms and marking applications in the exact format specified by the proposal. Commenters stated that they issue a single uniform certification form and marking application form of their own creation to all states with fire standard compliant cigarette programs when certifying a new cigarette. According to commenters, requiring manufacturers to submit the same information to Texas in an alternate form would impose administrative difficulties for manufacturers. Commenters proposed revisions to §§34.1202(2), 34.1207(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (2), 34.1210(d), 34.1211(a), 34.1212(a) and 34.1212(b) to implement this recommendation.

Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette) as adopted is revised to narrow the scope of the signature statement on page one of the form. The language above the signature line on page one of Form SF250 now reads: "I certify that the cigarette varieties listed on this form and attached to this certification *have been tested in accordance with and meet the performance standard in the Health and Safety Code §796.003 or 796.004* [comply with the Texas Health and Safety Code, Chapter 796 and the Texas Fire Standard Compliant Cigarette Rules]. By my signature, I verify that the information provided on this form and its attachments are true." The change was made in response to a commenter who stated that the proposed signature statement went beyond the certification requirement specified in the Health and Safety Code §796.005(a).

Form SF250 as adopted is revised to specify that the signature statement relating to cigarette testing entities, testing methods, and testing and quality assurance programs on page two of the form is optional. The signature heading on page two of Form SF250 now reads: "SIGNATURE *(This signature is optional and is not required.)*" The change was made in response to a commenter who stated that the proposed signature statement went beyond the certification requirement specified in the Health and Safety Code §796.005(a).

The heading on page two of Form SF250 as adopted is entitled "FSCC Testing Information." The change was made in response to a commenter who suggested that the title was more accurate than the proposed title of "FSCC Testing Form."

The necessary clarification changes to the proposed text include the following. The reference to §34.1212 in the proposal regarding the adoption by reference of Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette) in the definition of "Certification" in §34.1202(2) is changed to read §34.1212(a). A minor clarification to §34.1203(b)(4)(C) has been made to add the word "notice" which was inadvertently omitted in the published proposal. Adopted 34.1203(b)(4)(C) reads in pertinent part: "The SFMO will provide written notice as specified in subsection (c) of this section . . . ." The word "Section" is spelled out in §34.1204(a) and (b) as adopted to conform to the language of HB 2935. In accordance with the definition of "SFMO" in adopted §34.1202(13), the acronym "SFMO" has been substituted for the phrase "State Fire Marshal's Office" or "State Fire Marshal" in adopted §§34.1206(a)(1), 34.1207(a)(1), 34.1210(b)(1) and (c)(1), and 34.1211(a). Two clarifications have been made to the adopted Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC). The purpose of the form is to capture necessary information relating to certified cigarette varieties so that the SFMO may verify compliance with the Health and Safety Code Chapter 796. The third page of the form in item nine requests the Universal Product Code (UPC) for certified cigarette varieties. So that the SFMO may efficiently enforce the Health and Safety Code Chapter 796, item nine in the adopted form is revised to read "Package Universal Product Code (UPC)." In addition, item number ten, "Carton Universal Product Code (UPC)" is added in the adopted form. These revisions will also assist manufacturers by providing additional clarity in the certification process.

HOW THE SECTIONS WILL FUNCTION. Adopted §34.1201 sets forth the purpose, applicability, and proper citation for the adopted rules. The purpose is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes. Adopted §34.1201 specifies that the rules apply to all persons subject to the Health and Safety Code Chapter 796. The adopted section specifies that pursuant to the Health and Safety Code §796.001, entities that sell or offer to sell cigarettes in Texas are subject to the Health and Safety Code Chapter 796 and the rules in Subchapter L, Chapter 34, 28 Texas Administrative Code. The section specifies that the subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment to evaluate consumer acceptance of the cigarette. The rules may be cited as "The Texas Fire Standard Compliant Cigarette Rules."

Adopted §34.1202 provides definitions for terms used in the new rules, including *agent, certification, cigarette, department, fire standard compliant cigarette, manufacturer; marking, packaging, person, retailer, sale, sell, SFMO, testing laboratory; variety, and wholesale dealer.*

Adopted §34.1203 specifies general procedural provisions regarding required and voluntary submissions. Adopted §34.1203(a) specifies that unless as provided otherwise in the subchapter, the section applies to each certification form and marking application, including those submitted in an alternate form, request for an alternate certification form or marking application, request for an alternative test method and performance standard, and applicable fees. New §34.1203(b)(1) specifies the address and website location at which manufacturers may obtain the forms promulgated in adopted §34.1212. Adopted §34.1203(b)(2) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in lieu of a promulgated form. Adopted §34.1203(b)(3)(A) provides the address for manufacturer submissions and specifies that to the extent the SFMO and the Department agree upon an acceptable means of electronic submission, submissions may be transmitted electronically. Adopted §34.1203(b)(3)(B) requires that submissions be complete before they will be accepted by the SFMO and specifies that a complete form or application is one that provides all required information and is accompanied by all required fees. New §34.1203(b)(4) specifies SFMO initial actions upon receipt of initial submissions by entities regulated under the new subchapter. Under the adopted subsection, if the SFMO determines that a submitted marking application is incomplete, the SFMO must provide the manufacturer with written notice stating the reasons why the submitted marking

application is incomplete. Adopted §34.1203(b)(4)(A) requires the SFMO to provide written notice to the manufacturer submitting the certification form, marking application, or request for an alternative testing method that the certification form or marking application has been accepted as complete or that the request for an alternative testing method has been approved or the submission has been disapproved. Disapproved submissions will be followed by a written explanation stating the reason for disapproval and what subsequent actions the submitter may take. New §34.1203(b)(4)(B) provides that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Adopted §34.1203(b)(5) specifies the procedures for manufacturer resubmissions. Adopted §34.1203(b)(5) provides that a manufacturer has 180 days in which to correct any submission insufficiencies before a new submission with new fees is required. Adopted §34.1203(c) specifies that notice from the SFMO will be given by personal service or mailed to the manufacturer's address on record with the SFMO.

Adopted §34.1204 specifies that a wholesale dealer or retailer is not prohibited from selling in Texas the person's existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1, 2009, and the quantity is comparable to the quantity of cigarettes purchased during the previous year. However, cigarettes that do not comply with the new subchapter may not be sold in Texas after January 1, 2010.

Adopted §34.1205 specifies testing requirements for each cigarette variety. New §34.1205(a) specifies that except as provided in adopted §34.1206, relating to alternative testing methods, each cigarette variety must be tested in compliance with the Health and Safety Code §796.003. Adopted §34.1205(b) provides that the manufacturer is solely responsible for ensuring that all cigarette varieties not approved for alternative testing methods under §34.1206 are tested in compliance with the Health and Safety Code §796.003. Adopted §34.1205(c) specifies that the section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and the new rules and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards.

Adopted §34.1206 specifies alternative testing methods. The Health and Safety Code §796.004 authorizes a cigarette manufacturer to propose an alternative test method and performance standard upon a determination by the State Fire Marshal that a cigarette cannot be tested in accordance with the Health and Safety Code §796.003. Adopted §34.1206(a) specifies the general requirements for manufacturer requests for an alternative test method and performance standard. Adopted §34.1206(b) specifies that the SFMO may initiate review of an alternative test method to make a determination based on the application of the cigarette manufacturer or the SFMO's own action. New §34.1206(c) specifies that if the SFMO determines that a variety of cigarette cannot be tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard. New §34.1206(d) specifies the necessary showings that a manufacturer must provide in order for the SFMO to determine that the proposed alternative test method is sufficient. Adopted §34.1206(e) identifies the actions the manufacturer may take upon rejection of a proposal for an alternative test method. Adopted §34.1206(f) specifies the method for SFMO notification of manufacturers of determinations under the new section.

Adopted §34.1207 specifies information concerning the certification process, including submission of the required certification form, payment of certification fees, and the scope of certification. Adopted §34.1207(a) specifies that before a cigarette variety may be sold or offered for sale in this state, the manufacturer must complete and submit to the SFMO the promulgated certification form or an approved-for-use certification form and the required certification fee for each cigarette variety. Adopted §34.1207(b) specifies the circumstances allowing certification of numerous cigarette varieties in a single filing. Adopted §34.1207(c) specifies that a certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Under adopted §34.1207(d), the period for which the certification is valid is three years. New §34.1207(d) requires that in order for a manufacturer to continue selling a certified cigarette after the expiration of the certification period, the manufacturer must submit a new certification form accompanied by all required fees. New §34.1207(d)(3) specifies that a wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.

Adopted §34.1208 specifies what changes to a certified cigarette variety necessitate a separate certification. Adopted §34.1208 provides that if a certified cigarette variety is changed with respect to any one or more of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8), it is considered a different cigarette variety and must be certified as a new cigarette variety before it may be sold in this state. The cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) include: (i) brand or trade name on the package; (ii) style, such as light or ultra light; (iii) length in millimeters; (iv) circumference in millimeters; (v) the flavor, such as menthol or chocolate, if applicable; (vi) filter or nonfilter; (vii) package description, such as soft pack or box; and (viii) marking approved in accordance with the Health and Safety Code §796.006.

Adopted §34.1209 specifies the record and document retention requirements for each cigarette variety of manufacturers subject to the Health and Safety Code Chapter 796. New §34.1209(a) requires maintaining for a period of not less than three years after the sale of a cigarette variety copies of reports of all tests conducted on the cigarette variety and a copy of the submitted certification form. Adopted §34.1209(b) requires that the manufacturer, not later than 60 calendar days following the date the manufacturer receives a written request from the SFMO for records and documentation, deliver the requested records and documents to the SFMO.

Adopted §34.1210 specifies requirements relating to the package marking, including general requirements in §34.1210(a); submission of the proposed marking in §34.1210(b); and in §34.1210(c), SFMO procedure concerning approval or disapproval of the proposed marking. Adopted §34.1210(c)(1) specifies that the SFMO shall approve or disapprove a proposed marking within 10 business days after the date the complete marking application is received by the SFMO. Adopted §34.1210(c)(2) specifies that the SFMO shall approve a marking that is in use and approved for sale in another state or is a marking with the letters "FSC" appearing in eight-point or larger type and permanently printed, stamped, engraved, or

embossed on the package at or near the Universal Product Code. Adopted §34.1210(c)(3) provides that if the marking is not disapproved within 10 business days after the completed application is received by the SFMO, the proposed marking is deemed approved. Adopted §34.1210(c)(4) and (5) specify that the SFMO will provide the manufacturer with notice of the SFMO's approval or disapproval of the proposed marking. Adopted §34.1210(d) prohibits a manufacturer from altering an approved marking before submitting a marking application submission form to the SFMO.

Adopted §34.1211 addresses certification filing fees. New §34.1211(a) requires that payment of the certification fee accompany completed certification submissions. Under adopted §34.1211(b), fees must be paid on a cumulative total basis for each certification filing. Adopted §34.1211(c) provides that fees are not refundable and are not transferable. Under adopted §34.1211(d), the fee for the initial certification filing is $250 per cigarette variety and the renewal fee (required every three years) is $250 per cigarette variety.

Section 34.1212 addresses promulgated and alternate certification forms and marking applications. Adopted §34.1212(a) adopts by reference Form Number SF250, Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC). Adopted §34.1212(b) adopts by reference Form Number SF251, the Application for Fire Standard Compliant Cigarette Marking Approval. Adopted §34.1212(a) and (b) describe the contents of the forms and indicate that both forms are available at the Department's website at www.tdi.state.tx.us/forms/form18.html. Adopted §34.1212(c) specifies that the information required by the promulgated certification form or marking application may be submitted in an alternate form in lieu of the promulgated certification from or marking application. Adopted §34.1212(c)(1) specifies that manufacturers may submit an alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit both an alternate certification form and an alternate marking application. Adopted §34.1212(c)(2) specifies that the alternate forms must be approved by the SFMO. Adopted §34.1203(c)(3) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with adopted §34.1203. Adopted §34.1212(c)(4) specifies that submission of an alternate submission form is not required and is at the option of the manufacturer.

Adopted §34.1213 specifies that a violation of the Health and Safety Code Chapter 796 or the adopted subchapter may subject a person to civil penalties as set forth in the Health and Safety Code §796.010.

Adopted §34.1214 specifies that pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§34.1201. Purpose, Applicability, and Title.

Comment: A commenter recommends adding language to proposed §34.1201 to specify that the subchapter does not prohibit the sale of cigarettes solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette by using only the quantity that is reasonably necessary for the assessment. This commenter states that this exception is specified in the Health and Safety Code §796.014.

Agency Response: The Department agrees with the comment and §34.1201 as adopted is revised to add subsection (c) to read: "This subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to evaluate consumer acceptance of the cigarette. Only the quantity of cigarettes that is reasonably necessary for the assessment may be used."

§34.1202. Definitions.

Comment: A commenter recommends striking from the definition of "marking" in proposed §34.1202(7) the phrase "that has been approved by the State Fire Marshal's Office (SFMO)." The commenter explains that the qualifying language is unnecessary and potentially confusing because other portions of the subchapter discuss and distinguish "proposed markings" and "approved markings."

Agency Response: The Department agrees with the comment and §34.1202(7) as adopted is revised accordingly.

§34.1203. General Provisions Regarding Required and Voluntary Submissions.

Comment: A commenter requests the deletion of the language requiring "approval" or "disapproval" of certification forms in proposed §34.1203(b)(3) and (4). The commenter asserts that the Health and Safety Code does not specify that certification filings may be approved or disapproved by the SFMO.

Agency Response: The Department declines to make this change. The Health and Safety Code §796.005 requires that certifications be filed with the SFMO and that certifications include certain specified information and fees. The intent of the statute is to require manufacturers to file the information with the SFMO so that the SFMO may effectively and efficiently determine compliance with the Health and Safety Code Chapter 796. In order to effect this intent, it is necessary for the filed certifications to provide all of the statutorily required information. Those filed certifications that do not provide the statutorily required information do not meet the statutory standards, and therefore, the cigarettes that are the subject of the requested certification cannot be sold or offered for sale in this state. The means for determining the compliance with the statutory requirements for filed certifications consist of the "approval" and "disapproval" process. "Approval" and "disapproval" constitute the standard regulatory process for acceptance or rejection of forms filed with the Department.

§34.1204. Existing Inventory.

Comment: A commenter requests that proposed §34.1204(a) be revised to conform to Section 2(a) of HB 2935, 80th Legislature. Section 2(a) uses the phrase "the previous year" in lieu of the year "2008."

Agency Response: The Department agrees with the comment and §34.1204(a) as adopted is revised accordingly.

§34.1205. Testing.

Comment: A commenter suggests revising proposed §34.1205(c) to specify that the section does not apply to cigarette varieties that have been subsequently altered only

by changes that are not likely to alter their compliance with the reduced cigarette ignition propensity standards. The commenter recommends changing §34.1205(c) to more closely track the statutory retesting requirement specified in the Health and Safety Code §796.005(f). The commenter voices concern that the proposed requirement to except previously certified cigarettes from retesting only for changes to the brand name or to the package type varies from the requirement in the Health and Safety Code §796.005(f). Section 796.005(f) states that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards.

Agency Response: The Department disagrees that proposed §34.1205(c) is inconsistent with the Health and Safety Code §796.005(f). However, there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8). Therefore, in response to the commenter's concern, §34.1205(c) as adopted is revised to read: "This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and this subchapter and have been subsequently altered only by changes *which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796* [to the brand or trade name or package description]."

§34.1206. Alternative Testing Methods.

Comment: A commenter requests that the word "variety" be added to the certification requirement in proposed §34.1206(a)(1). The commenter states that the testing and certification requirements in the Health and Safety Code apply to cigarette varieties, rather than cigarettes.

Agency Response: The Department agrees with the comment and §34.1206(a)(1) as adopted is revised accordingly.

Comment: A commenter suggests that the phrase "or complaints concerning the cigarette variety" be deleted from §34.1206(b). The commenter states that the Health and Safety Code Chapter 796 has no provision specifying that a review of an alternative test method may be initiated based on complaints concerning the cigarette variety.

Agency Response: The Department agrees with the comment and §34.1206(b) as adopted is revised accordingly.

Comment: A commenter requests deletion of the requirement in §34.1206(d)(1) that a cigarette manufacturer demonstrate to the satisfaction of the SFMO that the alternative test method is equivalent to the performance standard specified in the Health and Safety Code §796.003. The commenter states that the Health and Safety Code §796.004 requires only that the manufacturer demonstrate that the performance standard is equivalent to the statutory standard, but does not require that the alternative test method itself be equivalent to the statutory performance standard.

Agency Response: The Department agrees with the comment and §34.1206(d)(1) as adopted is revised accordingly.

Comment: A commenter suggests deletion of the requirement in proposed §34.1206(d)(2)(B) that a manufacturer proposing an alternative test method approved in another state demonstrate that the state that has approved the alternative test method has a statute or regulation that includes a provision requiring the alternative performance method be equivalent to the statutory performance method. The commenter states that a statute or regulation comparable to the Health and Safety Code §796.004 would necessarily contain such a requirement and that the language in §34.1206(d) is therefore unnecessary.

Agency Response: The Department disagrees that the language is unnecessary and declines to make this change. The requirement adds clarity and necessary specificity for manufacturers proposing an alternative test method and performance standard based on approval in another state. In addition, the requirement is necessary to implement §796.004(b) of the Health and Safety Code. Section §796.004(b) provides that an approving state used as the basis for approval in this state must have enacted reduced cigarette ignition propensity standards that include a test method and performance standard that are the same as those contained in the Health and Safety Code Chapter 796. Section 796.004(b) also requires that the approving state's officials approved the proposed alternative test method and performance standard as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to the Health and Safety Code §796.004.

§34.1207. Certification.

Comment: A commenter requests that proposed §34.1207(b) be amended to include a requirement that only cigarettes that comply with the performance standard specified in the Health and Safety Code §796.003(b) may be certified.

Agency Response: The Department disagrees that this change is consistent with the Health and Safety Code Chapter 796. The Health and Safety Code §796.005(a) allows for certification of a cigarette tested under either the performance standard specified in §796.003 or §796.004.

Comment: A commenter requests the addition of a subsection to proposed §34.1207 to except retailers from the restrictions on selling a cigarette variety resulting from an expired certification filing.

Agency Response: The Department agrees that the statutory requirement in the Health and Safety Code §796.005(d) applies only to manufacturers and not to wholesale dealers or retailers. Therefore, the following provision is added to adopted §34.1207(d): "(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period."

§34.1208. Changes to Cigarette Variety.

Comment: One commenter objects to the proposed requirement in §34.1208(a) that a change made by a manufacturer to a characteristic listed in the Health and Safety Code §796.005(b)(1) - (8) necessitates a separate certification for the altered cigarette. The commenter suggests that the Department revise §34.1208 to allow for an amendment of an existing certification without requiring an additional recertification fee.

Agency Response: The Department disagrees that the Health and Safety Code Chapter 796 allows for any amendment of an existing certification. The Health and Safety Code §796.002(3)

prohibits the sale of a cigarette in this state unless it has been certified in accordance with the Health and Safety Code §796.005. The Health and Safety Code §796.005 specifies that a certification must include information on the characteristics of the cigarette as listed in §796.005(b)(1) - (8). Therefore, a change in one of the listed characteristics of the certified cigarette necessarily requires a new and separate certification.

Comment: A commenter suggests amending proposed §34.1208(a) to only require recertification for the characteristics listed in the Health and Safety Code §796.005(b)(1) - (7), rather than (1) - (8). The commenter explains that the element listed in the Health and Safety Code §796.005(b)(8), the approved cigarette marking, applies to all cigarette varieties and is not indicative of a specific cigarette variety.

Agency Response: The Department declines to make this change. Adopted §34.1202(15) specifies that a cigarette variety consists of all eight of the elements listed in the Health and Safety Code §796.005(b)(1) - (8). These eight characteristics will be used by the Department to identify and differentiate cigarette varieties. Because the Department's ability to enforce the Health and Safety Code Chapter 796 and the adopted rules is based on accurate identification of cigarette varieties, a change in the cigarette's marking would require a new certification. If there is no change in marking or other listed characteristic, no new certification is required.

Comment: One commenter suggests revising proposed §34.1208(b) relating to cigarette alterations requiring retesting to conform to the Health and Safety Code §796.005(f). Another commenter recommends deletion of proposed §34.1208(b). Both commenters voice concern that the proposed requirement in §34.1208(b) for cigarette retesting for alterations of any of the cigarette's physical characteristics listed in the Health and Safety Code §796.005(b)(1) - (8) goes beyond the requirement in the Health and Safety Code §796.005(f). Section 796.005(f) requires that a cigarette must be retested if the manufacturer's alteration to the cigarette is likely to alter its compliance with the reduced cigarette ignition propensity standards.

Agency Response: The Department disagrees that the requirement in §34.1208(b) is inconsistent with the Health and Safety Code §796.005(f). However, there may be other changes likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards that are not included in the cigarette characteristics listed in the Health and Safety Code §796.005(b)(1) - (8). For example, even though changes to a cigarette's packing density or chemical additives may be likely to alter a cigarette's compliance with the reduced cigarette ignition propensity standards, they are not listed as certification characteristics in the Health and Safety Code §796.005(b)(1) - (8). Therefore, subsection (b) is deleted from §34.1208 as adopted and the section title is revised to reflect this change.

§34.1209. Records Maintenance.

Comment: One commenter objects to the record maintenance requirements specified in proposed §34.1209(a) because the requirements are not consistent with the statutory requirement. According to the commenter, these requirements go beyond the recordkeeping requirements specified in the Health and Safety Code §796.007. The commenter states that the Health and Safety Code §796.007 requires that manufacturers retain testing records for all cigarettes offered for sale within the previous three years. However, proposed §34.1209 requires that records be kept for three years after the expiration of the certification period.

Agency Response: The Department agrees with the comment and §34.1209(a) as adopted is revised accordingly.

Comment: A commenter objects to the record maintenance requirements specified in proposed §34.1209(a) and (b) because the subsections require retention of documents in addition to the documents required to be maintained by the Health and Safety Code §796.007.

Agency Response: The Department agrees with the comment and §34.1209 as adopted is revised accordingly.

§34.1210. Marking of Package.

Comment: A commenter requests revising proposed §34.1210 to specify that the SFMO must approve a marking that is: (i) in use and approved for sale in another state or (ii) that has the letters "FSC" for Fire Standard Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code. According to the commenter, this requirement is also specified in the Health and Safety Code §796.006(b).

Agency Response: The Department agrees with the comment. Section 34.1210(c) as adopted is revised to add a paragraph (2) to specify the requested provisions.

§34.1212. Promulgated and Alternate Certification Forms and Marking Applications.

Comment: A commenter requests that information regarding a manufacturer's testing and quality assurance program be deleted from the proposed form in §34.1212, the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC) Form, Form SF250. The commenter states that the Texas Health and Safety Code does not require information regarding a manufacturer's testing and quality assurance program to be submitted with a certification.

Agency Response: The Department declines to make this change. The Health and Safety Code charges the SFMO with administration and enforcement of the Health and Safety Code Chapter 796. The information regarding testing and quality assurance is necessary to verify manufacturer compliance with the testing and quality assurance requirements of the Health and Safety Code Chapter 796.003.

§34.1214. Forfeiture Authority.

Comment: A commenter suggests adding "under Chapter 154, Texas Tax Code" to proposed §34.1214 to be consistent with the Health and Safety Code §796.010(c).

Agency Response: The Department agrees with the comment and §34.1214 as adopted is revised accordingly.

Form SF250 (Certification by Manufacturer for Fire Standard Compliant Cigarette).

Comment: A commenter requests that the signature statement on page one of Form SF250 be narrowed in its scope to conform to the certification requirement in the Health and Safety Code §796.005(a).

Agency Response: The Department agrees with the comment and the signature statement on page one of Form SF250 as adopted is revised accordingly.

Comment: A commenter suggests deletion of the signature statement and signature line on page two of Form SF250 relating to the cigarette testing entity, test method, and testing and quality assurance program. The commenter asserts that the Health and Safety Code Chapter 796 does not require such an attestation to these items on the certification form.

Agency Response: The Department agrees that the Health and Safety Code does not require a signed certification relating to the cigarette testing entity, test method, and testing and quality assurance program, but disagrees that the signature statement and signature line should be deleted. The Health and Safety Code requires that cigarette testing entities, test methods, and testing and quality assurance programs meet certain minimum qualifications. The SFMO is charged with the administration and enforcement of the Health and Safety Code Chapter 796 and has a statutorily based interest in verifying compliance with the requirements of the Health and Safety Code Chapter 796. However, as a result of the comment, the Department has changed the signature heading on page two of Form SF250 to specify that the signature is optional and is not required.

Comment: A commenter suggests that the heading on page two of Form SF250 be revised to read "FSCC Testing Information." The commenter states that this title more accurately describes the content of the page.

Agency Response: The Department agrees with the comment and the heading on page two of Form SF250 as adopted is revised accordingly.

Adoption of Specific Forms in Rule and Use of Alternate Certification Form and Marking Application

Comment: A commenter suggests deleting references throughout the proposed subchapter to a specific adopted form and amending language in numerous sections to allow for the submission of required information in alternate forms. The commenter states that not adopting a specific form by rule allows the SFMO the flexibility to update and change the form without going through the rulemaking process. The commenter also asserts that it would be burdensome on manufacturers to submit the information required by the certification forms and marking applications in the exact format specified by the proposal. The commenter states that they issue a single uniform certification form and marking application form of their own creation to all states with fire standard compliant cigarette programs when certifying a new cigarette, and that requiring manufacturers to submit the same information to Texas in an alternate form would impose administrative difficulties for manufacturers. The commenter proposes revisions to §§34.1202(2), 34.1207(a)(1), 34.1210(b)(1) and (b)(2), 34.1210(c)(1), 34.1210(c)(2), 34.1210(d), 34.1211(a), 34.1212(a) and 34.1212(b) to implement this suggestion.

Agency Response: The Department's position is that it has a statutorily based interest in requiring that all manufacturers submit required information in a manageable and uniform format. The Health and Safety Code charges the SFMO with administration and enforcement of the Health and Safety Code Chapter 796. This requirement is necessary for the SFMO to efficiently and effectively fulfill these administrative and enforcement responsibilities. However, in response to the commenter's concern, the Department has revised several sections throughout the subchapter as adopted to allow manufacturers to submit the information required by the certification form and marking application in alternate forms. Adopted §34.1203(b)(2) specifies the applicable procedure for a manufacturer request to use an alternate certification form or marking application. Adopted §34.1212(c)(1) specifies that manufacturers may submit an alternate certification form in conjunction with a promulgated marking application, that they may submit an alternate marking application in conjunction with a promulgated certification form, or that they may submit an alternate certification form and alternate marking application. Adopted §34.1212(c)(2) specifies that the alternate forms must be approved by the SFMO. Adopted §34.1203(c)(3) specifies that a manufacturer may submit a request to the SFMO to use an alternate form in accordance with adopted §34.1203. Adopted §34.1203(c)(4) specifies that a manufacturer may submit a request to use an alternate form in accordance with adopted §34.1203. Adopted §34.1212(c)(4) specifies that submission of an alternate form is not required and is at the option of the manufacturer. Additionally, §§34.1202(2), 34.1203(a)(1) and (2), 34.1203(b)(1) and (3)(A) and (3)(B), 34.1203(b)(4)(C)(i), 34.1207(a)(1)(B), 34.1207(d)(1) and (3), 34.1209(a)(1), 34.1210(b)(1) and (2), 34.1210(c)(1) and (3), 34.1210(d), 34.1211(a), and the titles to §34.1203 and §34.1212 as adopted address the filing of the alternate submission forms.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None.

Against: None.

Neither for nor against, with recommended changes: R.J. Reynolds Tobacco Company and Altria Client Services, Incorporated, on behalf of Philip Morris USA Incorporated.

STATUTORY AUTHORITY. The new sections are adopted under the Health and Safety Code §796.008, the Government Code §417.005 and §417.004, and the Insurance Code §36.001. The Health and Safety Code §796.008 specifies that the State Fire Marshal may adopt rules to administer the Health and Safety Code Chapter 796. The Government Code §417.005 specifies that the Commissioner of Insurance may, after consulting with the State Fire Marshal, adopt necessary rules to guide the State Fire Marshal in the investigation of arson, fire, and suspected arson and in the performance of other duties for the Commissioner of Insurance. The Government Code §417.004 specifies that the Commissioner of Insurance shall perform the rulemaking functions previously performed by the Texas Commission on Fire Protection. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§34.1201. Purpose, Applicability, and Title.

(a) The purpose of this subchapter is to implement the Health and Safety Code Chapter 796, regulating the testing, certification, marking, and sale of fire standard compliant cigarettes in the State of Texas.

(b) This subchapter applies to all persons subject to the Health and Safety Code Chapter 796. Pursuant to the Health and Safety Code §796.001, entities located outside of Texas, including those located in other countries, are subject to Chapter 796 if they sell or offer to sell a cigarette in Texas.

(c) This subchapter does not prohibit the sale of a cigarette solely for the purpose of the cigarette's assessment conducted by a manufacturer, or under the control and direction of a manufacturer, to

evaluate consumer acceptance of the cigarette. Only the quantity of cigarettes that is reasonably necessary for the assessment may be used.

(d) This subchapter shall be known and may be cited as "The Texas Fire Standard Compliant Cigarette Rules."

§34.1202. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Agent--A person licensed by the Texas Comptroller of Public Accounts' Office to purchase and affix adhesive or meter stamps on packages of cigarettes.

(2) Certification--Completion and submission by a cigarette manufacturer of Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, adopted by reference in §34.1212(a) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications), or completion of an alternate certification form as specified in §34.1212(c) of this subchapter.

(3) Cigarette--A roll for smoking:

(A) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; or

(B) that is wrapped in any substance containing tobacco that, because of the roll's appearance, the type of tobacco used in the filler or the roll's packaging and labeling, is likely to be offered to or purchased by a consumer as a cigarette.

(4) Department--Texas Department of Insurance.

(5) Fire Standard Compliant Cigarette--A cigarette variety that meets the requirements of the Health and Safety Code Chapter 796 regulating the testing, certification, marking, and sale of fire standard compliant cigarettes.

(6) Manufacturer--A person that manufactures or otherwise produces cigarettes for sale in this state, including cigarettes intended to be sold through an importer; or the first purchaser that intends to resell in this state cigarettes manufactured anywhere that the original manufacturer does not intend to be sold in this state.

(7) Marking--A manufacturer's designation on the package that is permanently stamped, engraved, embossed, or printed and that identifies the package as containing fire standard compliant cigarettes that meet the requirements of the Health and Safety Code §796.006 and §34.1210 of this subchapter (relating to Marking of Package).

(8) Packaging--Cigarette soft packs, hard packs, boxes, cartons, and cases.

(9) Person--An individual or entity, including a cigarette manufacturer, wholesale dealer, or retailer.

(10) Retailer--A person, other than a wholesale dealer, engaged in selling cigarettes or tobacco products.

(11) Sale--Any transfer of title or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means or any agreement. The term includes, in addition to sales using cash or credit, the giving of a cigarette as a sample, prize, or gift and the exchange of a cigarette for any consideration other than money.

(12) Sell--To sell or to offer or agree to sell.

(13) SFMO--State Fire Marshal's Office.

(14) Testing laboratory--Laboratory meeting the accreditation standards specified in the Health and Safety Code §796.003 that performs the fire standard cigarette compliance test. The testing laboratory may be owned or controlled by the cigarette manufacturer.

(15) Variety--A type of cigarette marketed by the manufacturer as being distinct from other types of cigarettes on the basis of the characteristics listed in the Health and Safety Code §796.005(b)(1) - (8).

(16) Wholesale dealer--A person who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale, including a person who owns, operates, or maintains one or more cigarette or tobacco product vending machines in premises owned or occupied by another person.

§34.1203. General Provisions Regarding Required and Voluntary Submissions.

(a) Applicability. Except as otherwise provided in this subchapter, this section applies to each:

(1) certification form and marking application, including those submitted in an alternate form in accordance with §34.1212(c) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications);

(2) request for an alternate certification or marking application form;

(3) request for an alternative test method and performance standard; and

(4) applicable fee required to be submitted to the SFMO under the Health and Safety Code §796.005(e) and §34.1211 of this subchapter (relating to Certification Filing Fees).

(b) Submissions.

(1) Promulgated certification forms and marking applications. The certification form and marking application form specified in §34.1212 of this subchapter (relating to Certification Forms and Marking Applications) may be obtained from the State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221 or the department's website at www.tdi.state.tx.us/forms/form18.html.

(2) Alternate certification form or marking application. A manufacturer may submit a request to the SFMO to use an alternate form as specified in §34.1212(c) of this subchapter in lieu of the promulgated certification form or marking application specified in §34.1212(a) and (b) of this subchapter. A manufacturer may request to use an alternate certification form or an alternate marking application, or both an alternate certification form and an alternate marking application. The request to use an alternate form should be submitted to the address specified in paragraph (1) of this subsection.

(3) Manner of submission.

(A) All certification forms, marking applications, including those submitted in an alternate form, requests for an alternative test method and performance standard, and applicable fees required to be submitted pursuant to the Health and Safety Code Chapter 796 and this subchapter must be submitted to the Fire Standard Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221, or to the extent that the SFMO and department determine an acceptable means of electronic submission, a certification form, marking application, request for an alternate certification or marking application form, request for an alternative test method and

performance standard, or applicable fee may be submitted electronically.

(B) Each certification form and marking application or approved-for-use alternate certification or marking application form submitted to the SFMO must be fully completed before it will be accepted and the filing will be considered for the purpose it was submitted. A completed certification form or marking application or completed alternate certification or marking application form is one that provides all required information and is accompanied by all required fees.

(4) SFMO initial actions on initial submissions.

(A) If the SFMO determines the submitted marking application is incomplete, the SFMO shall provide the manufacturer with written notice stating the reasons why the submitted marking application is incomplete. If this notification is not postmarked within 10 business days following the receipt of the marking application, the marking application is deemed approved as provided in §34.1210(c)(2) (relating to Marking of Package).

(B) A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing.

(C) The SFMO will provide written notice as specified in subsection (c) of this section that:

(i) the certification form or marking application has been accepted as complete or that the request for an alternative testing method or request for an alternate certification or marking application form has been approved; or

(ii) the submission has been disapproved. Disapprovals shall state in writing the reason the submission was not approved and that the person may take action as provided under paragraph (5) of this subsection.

(5) Resubmissions. If the submission is disapproved, the person making the submission may complete or correct the submission and resubmit it.

(A) If the corrected or completed submission is resubmitted to the SFMO within 180 days of receipt by the SFMO of the initial submission, the corrected or completed submission may be submitted without payment of additional fees.

(B) If the corrected or completed submission is not submitted within the 180-day time period, the corrected or completed submission constitutes a new submission and must be submitted with an additional payment to the SFMO of all required fees as specified in §34.1211 of this subchapter (relating to Certification Filing Fees).

(C) If the person chooses not to correct and resubmit the submission, the person shall have 30 days from the date of the last disapproval notice to make a written request for hearing to the SFMO. If a hearing is requested, the hearing will be granted, and the procedures for a contested case under the Administrative Procedure Act, Government Code Chapter 2001, shall apply.

(c) Written Notice from the SFMO. Notice by the SFMO, as required by provisions of this subchapter, shall be given by personal service or mailed, postage prepaid, to the mailing address of record for the submitting entity.

§34.1204. Existing Inventory.

(a) Pursuant to Section 2(a) of HB 2935 enacted by the 80th Legislature and subject to subsection (b) of this section, this subchapter does not prohibit a wholesale dealer or retailer from selling existing inventory of cigarettes on or after January 1, 2009, provided that the state tax stamps were affixed to the cigarettes before January 1, 2009, and the quantity is comparable to the quantity of cigarettes purchased during the previous year.

(b) Pursuant to Section 2(b) of HB 2935, a person may not sell or offer for sale a cigarette in this state that does not comply with this subchapter after January 1, 2010.

§34.1205. Testing.

(a) Except as provided in §34.1206 of this subchapter (relating to Alternative Testing Methods), each cigarette variety must be tested in compliance with the Health and Safety Code §796.003.

(b) The manufacturer is solely responsible for ensuring that all cigarette varieties not otherwise approved for alternative testing under §34.1206 of this subchapter are tested in compliance with the Health and Safety Code §796.003.

(c) This section does not apply to cigarette varieties that have been previously tested and certified in compliance with the Health and Safety Code Chapter 796 and this subchapter and have been subsequently altered only by changes which are not likely to alter the cigarette's compliance with the reduced cigarette ignition propensity standards required by the Health and Safety Code Chapter 796.

§34.1206. Alternative Testing Methods.

(a) General Requirements.

(1) Pursuant to §796.004 of the Health and Safety Code, a cigarette manufacturer may not certify a cigarette variety under the Health and Safety Code Chapter 796 and this subchapter using a cigarette testing method and performance standard other than the method specified in the Health and Safety Code §796.003 without the prior written authorization of the SFMO.

(2) The manufacturer is solely responsible for ensuring that all cigarettes accepted for alternative testing under this section are tested in compliance with the alternative testing method and performance standard accepted by the SFMO for that cigarette variety.

(3) SFMO authorization to use an alternative testing method and performance standard must be granted for each specific cigarette variety that will be subject to the alternative testing method and performance standard.

(4) Accepted requests for an alternative testing method and performance standard are not transferable to other cigarette varieties and may not be used to test other cigarette varieties without the prior written authorization of the SFMO.

(b) Initiation of Review of Alternative Test Method. The SFMO may initiate a review of an alternative test method to make a determination under this subsection based on the application of the cigarette manufacturer or the SFMO's own action.

(c) Request for an Alternative Test Method.

(1) If the SFMO determines that a variety of cigarette cannot be tested in accordance with the Health and Safety Code §796.003, a cigarette manufacturer may request an alternative test method and performance standard.

(2) A cigarette manufacturer may also seek authorization to use an alternative test method and performance standard approved in another state.

(3) Requests for authorization to use an alternative test method and performance standard must be submitted in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(d) SFMO Authorization.

(1) If a request is submitted under subsection (c)(1) of this section, the SFMO shall authorize the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that the performance standard proposed by the manufacturer is equivalent to the performance standard under the Health and Safety Code §796.003.

(2) If a request is submitted under subsection (c)(2) of this section, unless the SFMO can demonstrate a reasonable basis why the alternative test method should not be accepted under Health and Safety Code Chapter 796, the SFMO shall authorize the cigarette manufacturer to use the alternative test on the variety of cigarette if the cigarette manufacturer demonstrates to the satisfaction of the SFMO that:

(A) another state has enacted reduced cigarette ignition propensity standards that include a test method and performance standard that are the same as those contained in the Health and Safety Code Chapter 796; and

(B) the officials responsible for implementing those requirements have approved the proposed alternative test method and performance standard for the particular cigarette variety proposed by a manufacturer as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to the Health and Safety Code §796.004, including a provision that the performance standard proposed by the manufacturer is equivalent to, or greater than, the performance standard established under the Health and Safety Code §796.003.

(e) SFMO Rejection. If the requested alternative method is rejected by the SFMO, the cigarette manufacturer may proceed under §34.1203(b)(4) of this subchapter.

(f) SFMO Notice of Determination. Notice regarding the SFMO's determination concerning an alternative test method and performance standard requested pursuant to this section shall be made as described in §34.1203 of this subchapter.

§34.1207. Certification.

(a) Submission of Form and Payment of Fees. Before a cigarette variety may be sold or offered for sale in this state, the manufacturer of the cigarette variety must:

(1) complete and submit to the SFMO:

(A) the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, that is adopted by reference in §34.1212 of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications); or

(B) an approved-for-use alternate certification form as specified in §34.1212(c) of this subchapter; and

(2) pay the required certification fee for each variety of cigarette being certified as specified in the Health and Safety Code §796.005(e) and §34.1211 of this subchapter (relating to Certification Filing Fees).

(b) Scope of Certification. A manufacturer may certify any number of cigarette varieties in a single filing to the extent that the cigarette varieties:

(1) were all tested at the same testing laboratory;

(2) were tested using the same testing method and performance standard; and

(3) have the same manufacturer contact information.

(c) Validity Period for Certification. A certification that includes payment of all required fees is considered valid until the SFMO disapproves the certification submission in writing. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(d) Expiration of Certification.

(1) To continue to sell a cigarette variety that has been certified under this section the manufacturer of that cigarette variety must, within three years of the certification date, submit a new complete Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, or an approved-for-use alternate certification form as specified in §34.1212(c) of this subchapter to the SFMO that is accompanied by all required certification renewal fees specified in §32.1211(d) of this subchapter.

(2) Each certification period shall expire at 11:59 p.m. on the third anniversary of the date the certification is filed with the SFMO.

(3) A wholesale dealer or retailer may continue to sell a cigarette variety after the certification period for the variety has expired if the cigarettes sold by the wholesale dealer or retailer were purchased from a manufacturer before the expiration of the certification period.

§34.1208. Changes to Cigarette Variety.

If a certified cigarette variety is changed with respect to any one or more of the items listed in the Health and Safety Code §796.005(b)(1) - (8), it is considered a different cigarette variety and must be certified as a new variety in conformance with §34.1207 of this subchapter (relating to Certification) before the cigarette variety may be sold in this state. Certification must meet all requirements specified in §34.1207 of this subchapter.

§34.1209. Records Maintenance.

(a) For each cigarette variety offered for sale, the manufacturer shall document and maintain for a period of not less than three years after the cigarette variety was offered for sale the following information:

(1) a copy of the submitted Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, for the cigarette variety, or the submitted alternate certification form as specified in §34.1212(c) of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications); and

(2) copies of the reports of all tests conducted on that cigarette variety.

(b) The manufacturer shall, not later than 60 calendar days after the date the manufacturer receives a written request from the SFMO, make available to the SFMO copies of the records and documentation specified in the Health and Safety Code §796.007 and subsections (a) and (b) of this section. Except as agreed by the SFMO and the cigarette manufacturer, all copies requested to be made available under this section shall be delivered to the Fire Standard Compliant Cigarette Program Coordinator, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149221, Austin, Texas 78714-9221.

§34.1210. Marking of Package.

(a) General Requirements.

(1) The packaging of all cigarettes varieties certified by the manufacturer to comply with the Health and Safety Code Chapter 796 shall be marked in accordance with the provisions of the Health and Safety Code §796.006.

(2) A manufacturer shall use only one marking method applied uniformly to all cigarette packaging of all varieties marketed

by the manufacturer for compliance with the Health and Safety Code Chapter 796.

(b) Submission of Proposed Marking.

(1) Manufacturers must submit their proposed marking to the SFMO along with a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, that is adopted by reference in §34.1212 of this subchapter (relating to Promulgated and Alternate Certification Forms and Marking Applications), or with a completed approved-for-use alternate marking application form as specified in §34.1212(c) of this subchapter.

(2) The SFMO shall not be deemed to receive an Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or an approved-for-use alternate marking application on a Saturday, Sunday, or legal holiday. The day the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the approved-for-use alternate marking application is received by the SFMO shall not be included in computing the 10-day period.

(c) SFMO Approval or Disapproval.

(1) The SFMO shall approve or disapprove the proposed marking within 10 business days after the date the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the completed approved-for-use alternate marking application is received by the SFMO.

(2) The SFMO shall approve a marking that:

(A) is in use and approved for sale in another state; or

(B) has the letters "FSC" for Fire Standards Compliant appearing in eight-point or larger type and permanently printed, stamped, engraved, or embossed on the package at or near the Universal Product Code.

(3) Pursuant to the Health and Safety Code §796.006(b) if the marking is not disapproved within the 10 business days after the completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251 or the completed approved-for-use alternate marking application form is received, the proposed marking method shall be deemed approved.

(4) If the SFMO approves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written acknowledgement that the proposed marking method has been approved. Notice of approval shall be made in accordance with §34.1203 of this subchapter (relating to General Provisions Regarding Required and Voluntary Submissions).

(5) If the SFMO disapproves the proposed marking method under the requirements specified in the Health and Safety Code §796.006, the SFMO shall provide the manufacturer with written notice that the marking method may not be used by the manufacturer. Notice of disapproval shall be made in accordance with §34.1203 of this subchapter. The manufacturer may correct the application or appeal the disapproval as described in §34.1203 of this subchapter.

(d) Modification of Approved Marking. A manufacturer shall not modify an approved marking without first submitting a completed Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, or a completed alternate marking application as specified in §34.1203(b)(2) of this subchapter as set forth in this section and obtaining prior approval of the proposed marking method by the SFMO.

§34.1211. Certification Filing Fees.

(a) Payment of the certification filing fee must accompany completed submissions of the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, or the approved-for-use alternate certification form. Fees must be paid by money order, check or other method accepted by the SFMO. Money orders and checks must be made payable to the Texas Department of Insurance.

(b) Fees must be paid on a cumulative total basis for each certification filing.

(c) Fees are non-refundable and non-transferable.

(d) Fees for the Fire Standard Compliant Cigarette Certification filing are as follows:

(1) initial fee--$250 per cigarette variety; and

(2) renewal fee (every three years)--$250 per cigarette variety.

§34.1212. Promulgated and Alternate Certification Forms and Marking Applications.

(a) Promulgated Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250. The commissioner adopts by reference the Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250, which contains instructions for completion of the form; information regarding certification fees; requires information to be provided regarding the certification type, cigarette manufacturer, testing entity, test method, testing and quality assurance program and cigarette variety information required by the Health and Safety Code §796.005. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

(b) Promulgated Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251. The commissioner adopts by reference the Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251, which contains instructions for completion of the form and requires information to be provided regarding the cigarette manufacturer, marking approval, and a certification that the manufacturer will or has provided required information to cigarette wholesale dealers and agents. The form is available at the department's website at www.tdi.state.tx.us/forms/form18.html.

(c) Alternate Certification Form or Marking Application. The information required by the promulgated certification form or marking application may be submitted in an alternate form in lieu of the promulgated certification form or marking application.

(1) Manufacturers may submit either an alternate form in lieu of the promulgated certification form or an alternate form in lieu of the promulgated marking application or both an alternate certification form and alternate marking application. Manufacturers may submit an alternate certification form in conjunction with the promulgated Application for Fire Standard Compliant Cigarette Marking Approval, Form Number SF251. Manufacturers may submit an alternate marking application in conjunction with the promulgated Certification by Manufacturer for Fire Standard Compliant Cigarette (FSCC), Form Number SF250.

(2) The alternate form must be approved by the SFMO before the form may be used to file the information required in the promulgated certification form or marking application.

(3) A manufacturer may submit a request to the SFMO to use an alternate form in accordance with §34.1203 (relating to General Provisions Regarding Required and Voluntary Submissions).

(4) Submission of an alternate form in lieu of the promulgated certification or marking application is not required and is at the option of the manufacturer.

§34.1214. Forfeiture Authority.

Pursuant to the Health and Safety Code §796.010(c), a cigarette sold or offered for sale in violation of the Health and Safety Code Chapter 796 is subject to forfeiture under Chapter 154, Tax Code, except that before a forfeited cigarette may be destroyed, the true holder of the trademark rights in the cigarette brand must be permitted to inspect the cigarette.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806444
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 31, 2008
Proposal publication date: October 24, 2008
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 4. DISCRETE EMISSION CREDIT BANKING AND TRADING

30 TAC §101.376, §101.379

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §101.376 and §101.379 *with changes* to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6727).

These amendments will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The rulemaking creates an enforceable mechanism that allows the executive director to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area to a level consistent with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS).

The TCEQ DERC banking and trading program in the DFW eight-hour ozone nonattainment area is a discretionary economic incentive program (EIP) that uses market-based principles to encourage air pollution reductions in the most efficient manner as specified in EPA's guidance document, *Improving Air Quality with Economic Incentive Programs*, January 2001. In sections 5.3(c) and 6.4(a), the EPA's EIP guidance document specifies that if the state EIP program is part of a SIP for a nonattainment area, and an annual evaluation identifies an uncertainty or a potential for the EIP program to create a shortfall or adversely impact the attainment and maintenance of the NAAQS, then the program must include an enforceable commitment to correct the problem as expeditiously as possible. One reconciliation procedure identified to correct a potential SIP deficit is the restriction of banking and trading activities such as flow control or suspending the use of banked emissions. Section 16.15 of the guidance includes safeguards for EIPs with banking provisions that discuss additional provisions to prevent the EIP from interfering with the attainment and maintenance of the NAAQS. The safeguards specify that EIPs with banking provisions must demonstrate how likely it is that emission spiking would occur, include safeguards in the EIP to prevent emission spiking and geographic clustering, and include in the EIP SIP submittal a demonstration showing that banking and trading reductions would not interfere with attainment or maintenance of the NAAQS, or Reasonable Further Progress and Rate of Progress requirements.

The photochemical modeling submitted as part of the May 23, 2007, adopted DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard was based on EPA's growth projection analysis that all DERCs in the DFW area would be used to increase emissions of nitrogen oxides (NO_x) in 2009. While regulated entities in the DFW area have historically submitted Notice of Intent to Use Discrete Emission Credits (DEC-2 Forms), no DERCs have ever been used in the region for compliance with the state NO_x emission specifications for attainment demonstration, or to meet the standards of Chapter 117, Control of Air Pollution from Nitrogen Compounds. EPA Region 6 has indicated that in order to grant conditional approval of the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, the TCEQ would need to adopt an enforceable flow control mechanism to limit the use of DERCs in 2009 and in each subsequent calendar year in which the total amount of DERCs could potentially impact the attainment and maintenance of the 1997 eight-hour ozone NAAQS (73 FR 40203, July 14, 2008). Because the DERC program is an integral part of the control strategy for the DFW eight-hour ozone nonattainment area and modeling for the DFW Attainment Demonstration SIP includes the potential use of DERCs in the bank, the adopted changes will ensure that use of DERCs does not interfere with the attainment and maintenance of the 1997 eight-hour ozone NAAQS.

The adopted rules amend Chapter 101, Subchapter H, Division 4, Discrete Emission Credit Banking and Trading, to specifically grant the executive director the authority to approve the amount of DERCs available for use in any calendar year consistent with attainment and maintenance of the 1997 eight-hour ozone NAAQS. The adopted amendments will also change the deadline in DFW for the submittal of a DEC-2 Form from 45 days to specify that the forms are due by August 1 of the calendar year immediately prior to the applicable calendar-year use period. In the case of an emergency, DEC-2 Forms may be submitted after the August 1 deadline but may only be considered after all DEC-2 Forms submitted by the August 1 deadline are reviewed by the executive director and associated DERCs are allocated consistent with attainment and maintenance with the 1997 eight-hour ozone NAAQS, SIP requirements, and the current

flow control level. DERC use associated with DEC-2 Forms submitted after the August 1 deadline as a result of a direction to operate under an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency will not be subject to the flow control limit. The adopted change ensures adequate time for the executive director to determine the amount of available DERCs through the replicable annual review process.

The executive director is required to perform an annual review of the DFW DERC program using replicable procedures to determine the flow control limit and apportion available DERCs for potential use. The adopted flow control limit will ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS even with use of DERCs in the DFW eight-hour ozone nonattainment area. The executive director will also review the submitted DEC-2 Forms and apportion the number of DERCs approved for use in the upcoming calendar year. The results of the annual review and flow control limit calculation are required to be made available to the public and EPA by October 1 prior to the applicable calendar year control period.

The flow control limit for a particular year will be determined using the equation in new Figure: 30 TAC §101.379(c)(2)(A). The flow control limit will be the sum of the 2009 flow control limit in the November 2008 adopted DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan) plus the estimated emission reductions associated with fleet turnover that are not used to satisfy contingency requirements plus the unused DERCs generated on or after March 1, 2009, and approved for use in the previous calendar year control period that remain unused. This flow control limit design will prevent emission spiking and interference with the attainment and maintenance of the 1997 eight-hour ozone NAAQS as a result of using DERCs. In the event that data is not yet available for the calculation of the flow control limit during the annual review, the variables for the contingency requirements and unused DERCs will be assumed to be the values that result in the calculation of the most conservative flow control limit.

SECTION BY SECTION DISCUSSION

In addition to the adopted amendments to §101.376 and §101.379 discussed in this preamble, the commission is also making various stylistic non-substantive changes to update rule language to conform with current Texas Register style and format requirements and to establish more consistency throughout the rules.

Section 101.376, Discrete Emission Credit Use

The commission adopts §101.376(a)(5) with changes from proposal. In response to comments, the commission is not adopting proposed amendments to §101.376(a)(5) regarding limiting late submittals of DEC-2 Forms requests. Paragraph (6) is renumbered as paragraph (5) and clarified to allow a user to submit late DEC-2 Form requests for approval by the executive director only in the case of an emergency and if all other requirements in §101.376(a) are met. In response to comments, the commission has added the word "not" to ensure that DEC-2 Forms can only be submitted in an emergency situation as long as the flow control limit has not been reached in the DFW eight-hour ozone nonattainment area. An emergency under this section must still meet flow control limits.

In response to comments, the commission adopts §101.376(a)(6), which exempts an ERCOT-declared emergency situation, defined elsewhere in this preamble, from the flow control limit.

The commission adopts §101.376(a)(7), which establishes that DERC use must be preceded by executive director approval of a DEC-2 Form. In response to comments, §101.376(a)(7) is revised to only apply to the DFW eight-hour ozone nonattainment area.

The commission amends the amount of discrete emission credits of NO_x used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "10" instead of the word "ten." The commission also adopts the amount of discrete emission credits for volatile organic compounds used by permitted facilities in a 12-month period in §101.376(b)(1)(A) to the numerical "5" instead of the word "five."

The commission amends §101.376(b)(2)(C)(iii) to remove the requirement for DEC-2 Forms to include the original certificate for the amount of DERCs in the applicant's account. The commission has determined that this requirement is not necessary because the original paperwork is retained by the commission.

The commission adopts §101.376(c)(4) to use the acronym "DERC" instead of the phrase "discrete emission reduction credit" in order to conform to current Texas Register drafting standards.

The commission adopts §101.376(c)(7), which establishes that DERCs may not be used in the DFW eight-hour ozone nonattainment area if the DERC usage request exceeds the flow control limit for that year determined by the annual review as specified in §101.379(c), Program Audits and Reports.

The commission amends §101.376(d)(1)(B) to delete deadlines for the submittal of the DEC-2 Forms in order to create distinct regional deadlines. The commission adopts §101.376(d)(1)(B)(i), which changes the submittal deadline for DEC-2 Forms in the DFW eight-hour ozone nonattainment area from 45 days to August 1 of the calendar year immediately prior to the applicable calendar-year use period. The commission adopts §101.376(d)(1)(B)(ii) to specify the submittal deadlines for discrete emission credits for use in all other areas as previously contained in §101.376(d)(1)(B).

The commission amends §101.376(d)(3) by changing the phrase, "notice late" to "late DEC-2 Form" to clarify that the DEC-2 Form is the notice that may be submitted late in the case of an emergency.

The commission deletes §101.376(e)(3)(B) and amends §101.376(e)(3)(A) to include the deleted language specifying that the DERC use period must not exceed 12 months. As a result of these changes, the commission re-letters subparagraph (C) to subparagraph (B).

The commission adopts §101.376(f), which specifies that the executive director will apportion the amount of DERCs for each control period, as determined by the annual review, for the DFW eight-hour ozone nonattainment area. Additionally, §101.376(f)(1) specifies that if the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline is greater than the limit determined by the current annual review, the executive director will apportion the number of DERCs for use. Furthermore, §101.376(f)(1)(A) specifies the executive director will consider the appropriate amount of DERCs allocated for each DEC-2 Form submitted on a case-by-case basis. In determining the amount of DERCs to approve for each DEC-2 Form application, the executive director will take into consideration the provisions specified in §101.376(f)(1)(A)(i) - (v). These provisions include the total

number of DERCs existing in the nonattainment area bank; the total number of DERCs submitted for use in the upcoming control period; the proportion of DERCs requested for use to the total amount requested; the amount of DERCs required by the applicant for compliance with the eight-hour emission specifications; and the technological and economic aspects of other compliance options available to the applicant. In response to comments, the commission adds a new condition in §101.376(f)(1)(A)(vi) that allows the executive director to consider location when apportioning DERCs.

The commission adopts §101.376(f)(1)(B), which establishes that any credits requested for use by the applicant in the DEC-2 Form that were generated after March 1, 2009, will be included in the flow control limit determined by the annual review process, detailed later in this preamble. In response to comments, the commission removed the proposed phrase "and approved for use by the executive director for any subsequent control period" to clarify that requests for DERC use must be resubmitted each year. In addition, the phrase "certified by the executive director" was replaced with "generated" to clarify that DERCs created on or after March 1, 2009, are to represent reductions of emissions in the DFW eight-hour ozone nonattainment area beyond those modeled for the attainment demonstration.

The commission adopts §101.376(f)(2), which establishes that if the total number of DERCs submitted for use is less than the flow control limit determined according to the annual review, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

Section 101.379, Program Audits and Reports

The commission amends §101.379(b) by adding language to require the annual report to include the amount of DERCs approved for use under §101.379(c).

The commission adopts §101.379(c), which establishes that no later than October 1 of each year, the executive director will complete an annual review that determines the number of DERCs available for use in the DFW area under the flow control limit for the upcoming calendar year. The annual review will be documented in a publicly available report. In response to comments, the commission is changing the report date from November 1 to October 1. The number of DERCs available will be developed to ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS for each calendar year beginning in 2009. In response to comments, the commission adds language to §101.379(c) that specifies that the annual review will include the calculation of the flow control limit to ensure noninterference with attainment and maintenance of the 1997 eight-hour ozone NAAQS and the apportionment of DERCs.

The commission adopts §101.379(c)(1), which specifies that for the 2009 control period, the flow control limit for DERCs available for use will be the number prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard. In response to comments, the commission has added language to clarify that flow control is calculated in tons per day, where a day is a 24-hour period from midnight to midnight. This change was also made in §101.379(c)(2).

The commission adopts §101.379(c)(2) to specify how the flow control will be determined for control periods after 2009. The annual review will set the flow control limit for each year using the equation in §101.379(c)(2)(A). The equation calculates the flow control limit using variable "B" as the 2009 flow control limit prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard; variable "C_1" is the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar-year control period; variable "C_2" is the emission reduction associated with the contingency requirement for the current control period; variable "D_1" is the DERCs generated on or after March 1, 2009, and approved for use in the previous calendar-year control period; and variable "D_2" is the DERCs generated on or after March 1, 2009, and used in the previous calendar-year control period. In the definition of variables "C_1" and "C_2", the current calendar year is the year for which the flow control limit is being calculated. In the definition of variables "D_1" and "D_2", the previous calendar year" is the year immediately prior to the year for which the flow control limit is being calculated. In response to comments, the summation sign has been removed because it is redundant. In response to comments, the commission has removed the "E" term to avoid the potential for double counting of DERCs in the bank. Also in response to comments, the commission has made additional changes to clarify the equation. Specifically, the flow control is calculated in tons per day, where a day is a 24-hour period from midnight to midnight; and the emission reductions represented by C_2 are associated with contingency requirements for the calendar year for which the flow control limit is being calculated. The flow control limit for the 2009 control period, variable "B", is prescribed in the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard. Therefore, variables "C_1, C_2, D_1, or D_2" all equal zero for the 2009 control period. In addition, the commission has revised the definition of the variable "C_2" to clarify its value for the 2010 calendar year control period. Because the attainment status for the DFW area may not be determined by October 1, 2009, the executive director may not know whether the associated contingency measures have been triggered. Therefore, the executive director assumes the value of variable "C_2" to be equal to 12.98 tons per day for the 2010 control period (as demonstrated in Table 4-4: *2009-2010 Fleet Turnover Reductions for Contingency or Surplus* of the DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan)).

In response to comments, the commission is not adopting proposed §101.379(c)(2)(B), because the language was superfluous. The commission re-designates proposed §101.379(c)(2)(C) to adopted §101.379(c)(2)(B) to specify that if use of the entire DERC bank will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, the number of DERCs potentially available for use is the total number of DERCs in the bank. The commission re-designates proposed §101.379(c)(2)(D) to adopted §101.379(c)(2)(C), and adds §101.379(c)(2)(C)(i) to specify that should the flow control limit for a particular year, as calculated in the equation in Figure: 30 TAC §101.379(c)(2)(A), be greater than the total number of DERCs requested for use in accordance with §101.376(d), the executive director may approve all requested DEC-2 Form submittals. In response to comments, the commission adds §101.379(c)(2)(C)(ii) to clarify that emergency submittals will not be approved if the requested DERC use would exceed the flow control limit with the exception established by adopted §101.379(c)(2)(D). The commission adopts §101.379(c)(2)(D), which exempts DEC-2 Forms that are submitted in response to an ERCOT-declared emergency situation from the flow control limit. ERCOT directs and ensures reliable operation of the electric grid for the flow of electric power to 21 million Texas customers, representing 85 percent of the state's electric load. An ERCOT-declared emergency situation includes an operating

condition in which the safety or reliability of the ERCOT System is compromised or threatened, as determined by ERCOT. Section 101.379(c)(2)(D) provides a specific definition for an ERCOT-declared emergency situation.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted amendments to Chapter 101 and revisions to the SIP add an enforceable mechanism to allow the executive director to restrict the use of DERCs in the DFW eight-hour ozone nonattainment area and change the deadlines to submit a DEC-2 Form. The control mechanism is a flow control strategy that potentially limits the use of DERCs on an annual basis in the DFW eight-hour ozone nonattainment area. These amendments are necessary to ensure that potential use of DERCs would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. This rulemaking may potentially prohibit and limit the use and trading of DERCs in the DFW eight-hour ozone nonattainment area.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the amendments were developed to provide a flow control mechanism for the DERC program in the DFW eight-hour ozone nonattainment area and to ensure that potential use of DERCs would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. This flow control mechanism is developed in accordance with the EPA Economic Incentive Program Guidance document. The rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and authorized under the Texas Health and Safety Code (THSC).

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the ozone NAAQS in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the ozone NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the ozone NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule. These amendments are necessary to ensure that the DERC program does not interfere with attainment or maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that would have a material adverse impact and would exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the ozone NAAQS; thus, states must develop programs for each nonattainment area to ensure that the area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception

in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas such as the DFW eight-hour ozone nonattainment area. As discussed earlier in this preamble, the adopted rules would ensure that use of DERCs in the DFW eight-hour ozone nonattainment area would not interfere with the attainment and maintenance of the air quality standards established under federal law as 1997 eight-hour ozone NAAQS.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, Texas Clean Air Act (TCAA), and the Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of the rulemaking is to add an enforceable flow control process to the DERC program in the DFW eight-hour ozone nonattainment area, so that the use of DERCs will not interfere with the attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area. Promulgation and enforcement of the amendments will not burden private real property. The rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits that will be affected by these rules are not property rights (§101.372(j)). Because DERCs are not property, limiting the use of DERCs does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The changes to the use of DERCs within the DFW eight-hour ozone nonattainment area that are implemented by these rules were developed to ensure that the use of DERCs would not interfere with attainment and maintenance of 1997 eight-hour ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of ozone NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of ozone NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as ozone NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). This rulemaking will advance this goal through the establishment of a daily limit on the use of emission credits to ensure the attainment and maintenance of the 1997 eight-hour ozone NAAQS. No new sources of air contaminants would be authorized and the revisions would maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies. The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 101, Subchapter H is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 101, Subchapter H requirements.

PUBLIC COMMENT

Public hearings for this rulemaking were held on September 9, 2008, in Dallas, Texas and on September 10, 2008, in Arlington, Texas. No comments were submitted during the hearings. The comment period closed on September 12, 2008. Written comments were provided by the EPA and Luminant Power (Luminant).

RESPONSE TO COMMENTS

EPA recommended revising §101.376(a) to ensure that the DFW flow control provisions section only applies to the DFW ozone nonattainment area. The EPA also recommended restructuring the new paragraphs in §101.376(a) so that the rule clearly states that the emergency provisions will not be used to exceed the flow control limit established in §101.379(c).

The rule has been revised in response to this comment. Section 101.376(a)(6) has been changed to exclusively reference DFW. The commission is not adopting §101.376(a)(5) as proposed and instead adopts new language in §101.376(a)(5) to ensure that late Intent to Use submittals will be accepted and may only be approved in the case of an emergency or other exigent circumstances and if the use will not exceed the flow control limit or hinder attainment and maintenance of the 1997 eight-hour ozone NAAQS. However, as discussed elsewhere in this preamble, the commission includes §101.379(c)(2)(D) to clarify that DERCs used as a result of ERCOT-declared emergencies will not be subject to the flow control limit.

EPA commented that the proposed rule language should be revised such that a consistent term for describing the flow control time period is used. Throughout the proposed rule, "control period," "calendar year," and "calendar year control period" were used interchangeably.

The rule has been revised in response to this comment. The control period for any DERC use is variable and dependent on the time period requested in each Notice of Intent to Use. The 2009 flow control time period is from March 1, 2009, to December 31, 2009. Thereafter, the flow control time period will be the calendar year. In response to this comment, the commission has revised the rule to reference the broader term "control period" when referring to all nonattainment areas or to the 2009 flow control time period, and "calendar year" or "calendar year control period" when referring to the flow control time period in 2010 and thereafter in the DFW area.

EPA requested clarification that the flow control time period runs from January 1 through December 31. EPA also suggested that the March 1, 2009, date used in §101.376(f)(1)(B) and §101.379(c)(2)(A) should be changed to January 1, 2009, for consistency.

The rule has not been revised in response to this comment. The commission disagrees with the suggested change because the March 1, 2009, date in §101.376(f)(1)(B) and §101.379(c)(2)(A) only refers to the generation and certification of DERCs and not the flow control time period.

EPA is concerned that clusters of requested DERC usage could result in a localized ozone spike, even if the use is within the flow control limit; therefore, §101.376(f)(1)(A) should be revised to account for the location of the requested DERC usage.

The rule has been revised in response to this comment. The commission considers ozone spikes due to clusters of DERC usage to be highly unlikely because of the limited number of DERCs available. However, §101.376(f)(1)(A) is amended with the addition of §101.376(f)(1)(A)(vi) to include location as a factor for consideration in the allocation of approved DERC use. This amendment will allow the executive director to assess whether the potential for geographic clustering will impact attainment and maintenance of the 1997 eight-hour ozone NAAQS.

EPA recommended that "may" should be changed to "will" in proposed §101.376(f)(1)(A) in order to ensure the methodology is replicable.

The rule has not been revised in response to this comment. Section 101.376(f)(1)(A) does not refer to the replicable procedures that determine the flow control limit, but to the apportionment of DERCs approved for use. The executive director reserves the right to apportion the use of approved DERCs on a case-by-case basis with consideration of the relevant technical and economic factors affecting the applicants and the nonattainment area for that particular control period.

EPA requested that §101.376(f)(1)(B) be revised to specify that the Notice of Intent to Use Form must be resubmitted each year under §101.376(d).

The rule has been revised in response to this comment. The commission has removed the phrase "approved for use" from §101.376(f)(1)(B).

EPA commented that the methodology for establishing and increasing the flow control in 2009 and beyond is not replicable. EPA recommended that the flow control limit be calculated as a ton per day limit and not an average over the entire year for 2009 and beyond. EPA also recommended that the methodology for calculating the flow control limit be specified so that it is an approvable and replicable procedure.

The rule has been revised in response to this comment. The rule language now requires the use of the equation in §101.379(c)(2)(A) to calculate the annual flow control limit in tons per day for each calendar year. In addition, §101.379(c) requires the results of the calculation and numerical values of each term for that control period to be available to the EPA and the public in order to allow the calculation of the flow control limit to be replicated. The commission further revises §101.379(c) to specify that the annual review methodology consists of calculating the flow control limit as stated in §101.379(c)(2)(A). The commission also revises §101.379(c)(1) and §101.379(c)(2) to clarify that the flow control limit for 2009 and beyond establishes a daily limit in tons per day where a day is a 24-hour period from midnight to midnight.

EPA requested further explanation of the equation in §101.379(c)(2)(A) used for calculating the flow control limit in 2010 and beyond to define the summation term used in the equation; to define how C_1 and C_2 will be calculated to ensure the flow control calculation is replicable; explain how the inclusion of the (D_1-D_2) term will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS; and further clarify term E.

The rule has been revised in response to this comment. The commission has removed the summation term because it was redundant. The calculation method of surplus reductions using variables C_1 and C_2 is demonstrated in Table 4-4: *2009-2010 Fleet Turnover Reductions for Contingency or Surplus* of the DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard (Contingency Measures Plan) to address contingency measures for the DFW area. Current values for these terms are based on the 1999 DFW Base Year Emissions Inventory. The commission disagrees with the comment

that the D_1-D_2 term represents growth without restrictions that will interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS. Any increase in the D_1 term is derived from emissions removed from the airshed and certified as DERCs. Growth in the D_2 term represents DERCs used and limits growth in the flow control limit. In the event that DERCs are generated and not used, the flow control limit will increase but this increase will be directly attributable to the removal of emissions from the airshed. The inclusion of DERCs represented by these variables will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS because DERCs generated on or after March 1, 2009, represent reductions of emissions in the DFW ozone nonattainment area beyond what was modeled for the attainment demonstration. Therefore, attainment and maintenance of the 1997 eight-hour ozone NAAQS is preserved either through a limit on flow control or a growth in new DERCs resulting from an emissions decrease. The "E" term of the equation has been removed in order to prevent the potential for double counting.

EPA commented that §101.379(c)(2)(B) and (C) appeared to restate the same provision.

The rule has been revised in response to this comment. The commission agrees that these subparagraphs are redundant and has not adopted proposed §101.379(c)(2)(B). Proposed §101.379(c)(2)(C) is re-designated §101.379(c)(2)(B) and states that if the use of the entire DERC bank in the DFW area will not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS, a flow control limit is not necessary and the executive director will approve use of the entire bank.

EPA expressed concern that emergency requests may not be considered before flow control is deemed unnecessary. EPA requested clarification of the cut-off date that will be used to determine that flow control is not necessary and suggested revising the emergency provisions in §101.376 to reflect the cut-off date for late submittals of Notice of Intent to Use Forms.

The rule has been revised in response to this comment. With regard to EPA's concern that emergency requests may not be considered, the commission cannot consider requests that have not been received at the time of the evaluation. Neither can the commission speculate as to the number of DERCs that might be requested on an emergency basis. However, the commission agrees that revisions to §101.376 are necessary to address emergency situations. In response to EPA's comment, the commission is not adopting §101.376(a)(5) regarding general late submittals of DEC-2 Forms. Additionally, the commission has revised §101.379(c)(2) to provide provisions to address late submittal for emergency situations. Adopted §101.379(c)(2)(C) specifies that if the flow control limit has not been met, any late DEC-2 Forms submitted for emergency purposes will be considered on a case-by-case basis, but the executive director will not approve late DEC-2 Forms that would exceed the flow control limit calculated according to the equation in adopted §101.379(c)(2)(A). In addition, the commission has determined that an exception is necessary to address potential ERCOT-declared emergencies. Therefore, the commission is adopting §101.379(c)(2)(D), which defines and exempts from the flow control limit an ERCOT-declared emergency situation. Without this exemption, a regulated entity could be put into a situation of either non-compliance with TCEQ rules or contributing to electrical grid instability by not responding to an ERCOT emergency notice.

Luminant requested that the annual review described by §101.379(c) be required by an earlier date such that applicants can be notified of the number of DERCs approved for use by October 1. The reason for this recommendation is for advanced operational and budgetary planning purposes.

The rule has been revised in response to this comment. The commission has revised §101.379(c) to move the deadline for completion of the annual review to October 1 in order to provide approved applicants sufficient time for operational and budgetary planning. However, the executive director needs sufficient time to perform the evaluation required by §101.376. Therefore, the commission has changed the submittal date of DEC-2 Forms in §101.376(d)(1)(B)(i) to August 1.

Luminant requested that the rule be revised to allow DEC-2 Forms that are submitted late in the case of an emergency to be faxed or otherwise electronically submitted to the agency, or that the commission indicate in the preamble that it will accept electronic submittal in such a situation.

The rule has not been revised in response to this comment. The commission will accept faxed and other electronically submitted DEC-2 Forms provided the electronic submittal is followed by a hard copy. This is necessary to ensure compliance with 30 TAC Chapter 19, Electronic Reporting.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amended sections are also adopted under THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; and §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amended sections are also adopted under 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights. The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, and 382.017.

§101.376. Discrete Emission Credit Use.

(a) Requirements to use discrete emission credits. Discrete emission credits may be used if the following requirements are met.

(1) The user shall have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(2) The user shall hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(3) The user shall acquire additional discrete emission credits during the use period if it is determined the user does not possess enough discrete emission credits to cover the entire use period. The user shall acquire additional credits as allowed under this section prior to the shortfall, or be in violation of this section.

(4) Facility or mobile source operators may acquire and use only discrete emission credits listed on the registry.

(5) In the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), a user may only apply to use discrete emission reduction credits (DERCs) under the provision in subsection (d)(3) of this section if the amount to be used would not cause the flow control limit to be exceeded as established in §101.379(c)(2)(A) of this title (relating to Program Audits and Reports).

(6) If a late Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) is submitted in response to an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation, as defined in §101.379(c)(2)(D) of this title, the request will not be subject to the flow control limit and may be approved.

(7) For DERC use in the DFW eight-hour ozone nonattainment area, the executive director has approved the intent to use as prescribed in subsection (f)(1) of this section.

(b) Use of discrete emission credits. With the exception of uses prohibited in subsection (c) of this section or precluded by commission order or condition within an authorization under the same commission account number, discrete emission credits may be used to meet or demonstrate compliance with any facility or mobile regulatory requirement including the following:

(1) to exceed any allowable emission level, if the following conditions are met:

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 10 tons for nitrogen oxides or 5 tons for volatile organic compounds in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations (CFR) §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(2) as new source review (NSR) permit offsets, if the following requirements are met:

(A) the user shall obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified facility in the NSR permit;

(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and

(C) the NSR permit must meet the following requirements:

(i) the permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;

(ii) prior to issuance of the permit, the user shall identify the discrete emission credits; and

(iii) prior to start of operation, the user shall submit a completed DEC-2 Form;

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided in §101.356(g) of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) before it has been acquired by the user;

(2) for netting to avoid the applicability of federal and state NSR requirements;

(3) to meet (as codified in 42 United States Code (USC), Federal Clean Air Act (FCAA)) requirements for:

(A) new source performance standards under FCAA, §111 (42 USC, §7411);

(B) lowest achievable emission rate standards under FCAA, §173(a)(2) (42 USC, §7503(a)(2));

(C) best available control technology standards under FCAA, §165(a)(4) (42 USC, §7475(a)(4)) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112 (42 USC, §7412), including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129 (42 USC, §7429);

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3) (42 USC, §7511a(b)(4) or (c)(3));

(G) ozone control standards set under FCAA, §183(e) and (f) (42 USC, §7511b(e) and (f));

(H) clean-fueled vehicle requirements under FCAA, §246 (42 USC, §7586);

(I) motor vehicle emissions standards under FCAA, §202 (42 USC, §7521);

(J) standards for non-road vehicles under FCAA, §213 (42 USC, §7547);

(K) requirements for reformulated gasoline under FCAA, §211(k) (42 USC, §7545); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and (i) (42 USC, §7545(h) and (i));

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of §106.261 or §106.262 of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director and the United States Environmental Protection Agency. This paragraph does not apply to limit the use of DERC or mobile DERC in lieu of allowances under §101.356(h) of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status;

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director; or

(7) in the DFW eight-hour ozone nonattainment area, if the DERC usage requested exceeds the flow control limit for a particular year determined by the annual review as specified in §101.379(c) of this title.

(d) Notice of intent to use.

(1) A completed DEC-2 Form, signed by an authorized representative of the applicant, must be submitted to the executive director in accordance with the following requirements.

(A) Discrete emission credits may be used only after the applicant has submitted the notice and received executive director approval.

(B) The application must be submitted:

(i) for DERC use in the DFW eight-hour ozone nonattainment area, no later than August 1 prior to the beginning of the calendar year that the DERCs are intended for use; and

(ii) for all other discrete emission credit use, at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) A copy of the application must also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area, as listed in 40 CFR Part 81 (2001).

(D) The application must include, but is not limited to, the following information for each use:

(i) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(ii) the amount of discrete emission credits needed;

(iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;

(iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable regulatory requirements;

(vi) a complete description of the protocol, as submitted by the executive director to the United States Environmental Protection Agency for approval, used to calculate the amount of discrete emission credits needed;

(vii) the actual calculations performed by the user to determine the amount of discrete emission credits needed;

(viii) the date that the discrete emission credits were acquired or will be acquired;

(ix) the discrete emission credit generator and the original certificate of the discrete emission credits acquired or to be acquired;

(x) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired, except for transfers between sites under common ownership or control;

(xi) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, the discrete emission credits were not generated as a result of actions prohibited under this regulation, and the discrete emission credits will not be used in a manner prohibited under this regulation; and

(xii) a certification of use, that must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) DERC use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.123, 117.223, 117.320, 117.323, 117.423, 117.1020, 117.1120, 117.1220, or 117.3020 of this title (relating to Source Cap; and System Cap), a user may use the equations listed in those sections, or the following equations.

(i) For the rolling average cap:
Figure: 30 TAC §101.376(d)(2)(A)(i) (No change.)

(ii) For maximum daily cap:
Figure: 30 TAC §101.376(d)(2)(A)(ii) (No change.)

(B) The amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.
Figure: 30 TAC §101.376(d)(2)(B) (No change.)

(C) The amount of discrete emission credits needed to exceed an allowable emissions level is calculated as follows.
Figure: 30 TAC §101.376(d)(2)(C) (No change.)

(D) The user shall retire 10% more discrete emission credits than are needed, as calculated in this paragraph, to ensure that the facility or mobile source environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than 10 tons, an additional 5.0% of the discrete emission credits needed, as calculated in this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(3) A user may submit a late DEC-2 Form in the case of an emergency, or other exigent circumstances, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation.

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the notice of intent to use. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a facility or mobile source if the credit and use cannot be demonstrated to meet the requirements of this section.

(5) If the facility is in an area with an ozone season less than 12 months, the user shall calculate the amount of discrete emission credits needed for the ozone season separately from the non-ozone season.

(e) Notice of use.

(1) The user shall calculate:

(A) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, associated with actual use; and

(B) the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, but not associated with the actual use, and available for future use.

(2) DERC use is calculated by the following equations.

(A) The amount of discrete emission credits used to demonstrate compliance or meet a regulatory requirement is calculated as follows.
Figure: 30 TAC §101.376(e)(2)(A) (No change.)

(B) The amount of discrete emission credits used to comply with permit allowables is calculated as follows.
Figure: 30 TAC §101.376(e)(2)(B) (No change.)

(3) A DEC-3 Form, Notice of Use of Discrete Emission Credits, must be submitted to the commission in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period. Each use period must not exceed 12 months.

(B) The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:

(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;

(ii) the actual amount of discrete emission credits possessed during the use period;

(iii) the actual emissions during the use period for volatile organic compounds and nitrogen oxides;

(iv) the actual amount of discrete emission credits used;

(v) the actual environmental contribution; and

(vi) the amount of discrete emission credits available for future use.

(4) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(5) The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

(f) DFW eight-hour ozone nonattainment area DERC usage.

(1) If the total number of DERCs submitted for the upcoming control period in all DEC-2 Forms received by the deadline in subsection (d)(1)(B)(i) of this section is greater than the flow control limit determined by the annual review specified in §101.379(c) of this title, applicable to the control period specified in the DEC-2 Form, the executive director shall apportion the number of DERCs for use.

(A) The executive director shall consider the appropriate amount of DERCs allocated for each DEC-2 application submitted on a case-by-case basis. In determining the amount of DERC use to approve for each DEC-2 application, the executive director may take into consideration:

(i) the total number of DERCs existing in the nonattainment area bank;

(ii) the total number of DERCs submitted for use in the upcoming control period;

(iii) the proportion of DERCs requested for use to the total amount requested;

(iv) the amount of DERCs required by the applicant for compliance;

(v) the technological and economic aspects of other compliance options available to the applicant; and

(vi) the location of the facilities for which owners or operators are requesting use of DERCs.

(B) Any credits requested for use by the applicant in the DEC-2 Form that were generated after March 1, 2009, will be applied to the flow control limit determined by the annual review as specified in §101.379(c) of this title.

(2) If the total number of DERCs submitted for use is less than the flow control limit for that particular year determined according to the annual review specified in §101.379(c) of this title, the executive director may approve all requests for DERC usage provided that all other requirements of this section are met.

§101.379. Program Audits and Reports.

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division;

(3) a summary of all trades completed under this division; and

(4) the amount of discrete emission reduction credits (DERC) approved for use under subsection (c) of this section.

(c) No later than October 1 of each year, the executive director will complete, and make available to the general public and the United States Environmental Protection Agency, an annual review to determine the number of DERCs available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The annual review will include the calculation of the flow control limit as specified in subsection (c)(2)(A) of this section to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and the apportionment of approved DERCs.

(1) For the 2009 control period, the flow control limit for DERCs available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(A) The flow control limit for a particular year will be determined using the following equation:
Figure: 30 TAC §101.379(c)(2)(A)

(B) If use of the entire DERC bank would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(C) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use) the executive director:

(i) may approve all requested Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) submittals; and

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an emergency notice, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by ERCOT as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006), is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806478
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: August 22, 2008
For further information, please call: (512) 239-6090

♦ ♦ ♦

CHAPTER 299. DAMS AND RESERVOIRS

The Texas Commission on Environmental Quality (commission or agency) adopts the repeal of §§299.1 - 299.5, 299.11 - 299.18, 299.21 - 299.31, 299.51, and 299.61; and new §§299.1 - 299.7, 299.11 - 299.17, 299.21 - 299.33, 299.41 - 299.46, 299.51, 299.52, 299.61, 299.62, 299.71, and 299.72.

New §§299.1, 299.2, 299.6, 299.13 - 299.16, 299.21 - 299.24, 299.27, 299.42 - 299.45, 299.51, 299.52, 299.61 and 299.62 are adopted *with changes* to the proposed text as published in the July 25, 2008, issue of the *Texas Register* (33 TexReg 5859). New §§299.3 - 299.5, 299.7, 299.11, 299.12, 299.17, 299.25, 299.26, 299.28 - 299.33, 299.41, 299.46, 299.71 and 299.72 and the repealed sections are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The existing dam safety rules, adopted in 1986, were developed after significant changes were made to the standards used to evaluate dams by the National Dam Safety Program. Even though the agency's Dam Safety Program has undergone significant changes since then, no changes have been made to the existing rules since their adoption in 1986. The commission adopts the repeal of the existing rules in Chapter 299 and adopts new, updated rules in Chapter 299.

In recent years, three distinct reviews were conducted of the Dam Safety Program rules. The reviews included: 1) the Executive Director's Task Force on Dam Safety (a task force of 26 stakeholders representing a wide cross section of interests) in 1998; 2) the House Natural Resources Subcommittee on Dam Safety in November of 1998; and 3) a peer review by the Associ-

ation of State Dam Safety Officials, at the request of the agency, in 2003. The reviews made several recommendations for significant modifications and updates to the existing rules. This rulemaking incorporates many of the recommendations.

Two stakeholder meetings were held in 2005 with approximately 40 individuals representing owners, professional engineers, associations, and sponsors of Natural Resources Conservation Service which assisted project dams, federal agencies, and state agencies. Owners included members of the general public. Environmental groups were also invited but did not attend. Considerable input was received and incorporated in this rulemaking. Staff also reviewed dam safety rules from at least ten states in 2005.

Other meetings were held in 2005 and 2006 with the Texas Association of Watershed Sponsors, Texas Water Conservation Association, and American Society of Civil Engineers to discuss the proposed rule package.

Two additional stakeholder meetings were held in 2008 with approximately 40 individuals, including several individuals who participated in the 2005 stakeholder meetings. Considerable input was again received and incorporated in this rulemaking.

The State Auditor's Office prepared *An Audit Report on the Dam Safety Program at the Texas Commission on Environmental Quality*, published in May 2008. It was recommended in this report that the commission should revise the rules to address key dam safety practices.

These adopted new rules make the program more similar to federal and other state programs.

In this action, the existing rules are repealed and new rules are adopted. The adopted new rules relate to design, review, and approval of construction plans and specifications; construction, operation and maintenance, inspection, repair, removal, emergency management, site security, and enforcement of proposed and existing dams. The commission revised existing criteria to make the rules more consistent with current engineering industry practices. The adopted new rules also include added requirements for emergency action plans, gate operating plans, and security plans and better define an owner's responsibilities.

The adopted new rules also provide options for upgrading existing dams. These adopted new rules ease some of the inspection burden by removing small- and intermediate-size, low-hazard dams from a periodic inspection schedule.

The adopted new rules improve the organizational flow of the requirements and update all relevant cross-references and citations.

The commission adopts administrative changes throughout the rules to be consistent with Texas Register requirements and agency guidelines. These changes include spelling out acronyms, updating references to the commission's predecessor agencies, and updating cross-references.

The commission adopts the repeal of all sections of the current chapter and adopts new sections that improve organization and readability. The adopted rules reorganize this chapter to remove redundancy in the requirements and place similar requirements in the same section.

SECTION BY SECTION DISCUSSION

Adopted new §299.1, Applicability, establishes the applicability of this chapter.

Existing §299.1(1), relating to the definition of dam, is moved in part to adopted new §299.1 to clarify how this chapter applies to different types of dams and to be consistent with the definition used in federal regulations.

Adopted new §299.1(a) limits the applicability of this chapter to certain types of dams and ensures that the commission's rules correspond to federal regulations. Figure: 30 TAC §299.1(a)(2) is added to make the definition clearer. In response to comment, the commission has added §299.1(a)(4) to include pumped storage or terminal storage facilities for clarity.

Adopted new §299.1(b) includes language indicating that all requirements for dams are included in this chapter, but does not relieve the owner from meeting the requirements for water rights and Edwards Aquifer protection plans. This is necessary to ensure that owners are aware of other requirements that may apply to their dams.

Adopted new §299.1(c) includes language from existing §299.1(1) and adds federally owned dams from existing §299.21, Applicability, and above ground water storage tanks to the list of dams not covered by these rules to be consistent with the practice of the Dam Safety Program. In response to comment, the commission has defined above ground storage tanks as either steel, concrete, or plastic. This change is necessary to clarify that earth embankments are not included in the definition of above ground storage tanks and therefore are covered by these rules.

Adopted new §299.1(d) provides that all dams shall meet the size and hazard requirements of the chapter, including those exempt from the requirements of Subchapter C, Construction Requirements, and those that are granted an exception under §299.5, Exception. This rule is necessary to make it clear that all owners of dams shall follow the requirements and to prevent dams from being constructed without using standards as outlined in this chapter. In response to comment, the commission has further clarified the rule to include dams that do not require a water right permit.

Existing §299.1, Definitions, is repealed and moved to adopted new §299.2, Definitions. The definitions for "Effective crest of the dam," "Probable maximum flood (PMF)," and "Probable maximum precipitation (PMP)," "Existing dam," "Height of dam," "Normal storage capacity," and "Proposed dam" are moved from existing §299.1 to the adopted new §299.2 (discussed further), renumbered to accommodate the addition of new definitions now found in adopted new §299.2, and changed to clarify the language to avoid misinterpretation. The commission determined that there was a need for clearer definitions because a number of questions have been raised on the interpretation of these definitions.

The definition for "Dam" is moved from existing §299.1 to new §299.2(14), renumbered to accommodate the addition of new definitions, and changed to clearly identify a dam as being a barrier, or barriers, constructed for the purpose of impounding water. The definition is expanded to include a dam's appurtenant structures as being part of the dam and to indicate that it would be used for the purpose of either permanently or temporarily impounding water. The commission determined that this is a more inclusive definition, similar to the federal definition.

The definition for "Deliberate impoundment" is moved from existing §299.29, Deliberate Impoundment, and is included in the list of definitions in adopted new §299.2(17), instead of in the text of the rules to avoid confusion. The formatting and the rule lan-

guage have been modified to be consistent with Texas Register requirements and agency guidelines, but there are no substantive changes.

The definition of "Deficient dam" is included in adopted new §299.2(16) to ensure that the commission's rules correspond to the definition in the federal regulations. In response to comment, the commission has added the word "significant" before the word "threat" to be consistent with other sections in the rule.

The definitions for "Spillway design flood" and "Spillway evaluation flood" are deleted and replaced by the term "Design flood" in adopted new §299.2(18) in order to remove redundancy and avoid confusion. "Design flood" includes both deleted terms.

The definition for "Hazard classification" is moved from existing §299.13, Hazard Classification Criteria, to adopted new §299.2(29) and changed to clarify the language. The commission determined that the language in existing §299.13 was confusing since numerous questions have been received concerning the definition.

The definition for "Maximum storage capacity" is moved from existing §299.1 to adopted new §299.2(36). The definition is expanded to reflect that, for purposes of these rules, the storage capacity does not include areas that would be below natural ground. The commission determined that the maximum storage capacity was related to the amount of water that would be released during a failure of the dam and that water impounded below natural ground would not be released during such an event.

The definition for "Owner" is included to list the different persons that could be identified as an owner of a dam. Adopted new §299.2(44)(A) lists an owner as a person who holds legal possession or ownership of an interest in a dam. Adopted new §299.2(44)(B) lists an owner as a person who is the fee simple owner of the surface estate of the tract of land on which the dam is located. Adopted new §299.2(44)(C) lists an owner as a person who is a sponsoring local organization of a dam constructed by the Natural Resources Conservation Service. Adopted new §299.2(44)(D) lists an owner as a person who has a lease, easement, or right-of-way to construct, operate, or maintain a dam. This is necessary to list all potential owners of a dam.

The definitions for "Abandon," "Accepted engineering practices," "Alteration," "Appurtenant structures," "Breach," "Breach analysis," "Breach inundation area," "Closure of dam," "Closure section," "Commence construction," "Conceptual design," "Construction," "Construction change order," "Dam failure," "Detention dam," "Drawdown," "Emergency action plan," "Emergency repairs," "Emergency spillway," "Engineering inspection," "Enlargement," "Fetch," "Inundation map," "Loss of life," "Main highways," "Maintenance," "Maintenance inspection," "Minimum freeboard," "Minor highways," "Modification," "NAD83 conus datum," "NAVD88 datum," "Outlet," "Piping," "Principal spillway," "Professional engineer," "Reconstruction," "Rehabilitation," "Removal," "Repairs," "Reservoir," "Safe manner," "Seal," "Secondary highways," "Secure location," "Spillway," "Sponsoring local organization," "Stability analysis," and "Substantially complete" are included in adopted new §299.2 to clearly define terms and words that are unique to the dam safety industry for clarity of their use in this chapter.

In response to comment, the commission has changed the words "controlled of" in §299.2(5), Breach, to the words "controlled or" to better describe the conditions of a breach.

In response to comment, the commission has changed the word "analyses" in §299.2(6), Breach analysis, to the word "analysis" to correct a spelling error.

In response to comment, the commission has changed the word "backfill" in §299.2(8), Closure of dam, to the word "material" to provide a clearer definition.

In response to comment, the commission has deleted the phrase "flood-induced or piping" in §299.2(32), Loss of life, since there could be other causes for failure and has changed the phrase "without considering evacuation or other emergency actions that could be taken" to "without considering the mitigation of loss of life that could occur with evacuation or other emergency actions" for clarity.

In response to comment, the commission has added "or any future updates" to §299.2(41), NAD83 conus datum, to provide for any changes in the future.

In response to comment, the commission has added a definition in §299.2(51) for "pumped storage dam" to provide a definition for a new term used in the chapter. The remaining definitions in §299.2 have been renumbered.

Existing §299.2, General, and existing §299.3, Duties, Obligations, and Liabilities of Dam Owners, are repealed and the requirements contained in those sections are either deleted or moved from the repealed sections to new sections to improve the organization and readability.

Adopted new §299.3(a) includes that the executive director may require an owner to obtain an independent team of consultants or other dam safety experts to evaluate the adequacy of the dam or appurtenant structures if the executive director has determined that the dam constitutes a significant threat to human life or property. Language was added to the rule to provide the requirements for use of an independent team of professional engineers or other dam experts and will also be included in a guidance document developed by the executive director. The commission determined that an independent team will be better able to evaluate all aspects of the adequacy of the dam and make recommendations. This process has been used successfully at least two times for dams in Texas. These determinations may be necessary for certain dams in order to ensure their safety and compliance with these rules.

Adopted new §299.3(b) requires that an owner submitting an application for a water rights permit that includes a dam, provide documentation that the proper materials to ensure that the requirements of this rule will be met during the application review are submitted.

Existing §299.4, Registered Engineer, is repealed and the adopted new §299.4 is renamed "Professional Engineer" to agree with the term used by the Texas Board of Professional Engineers.

Adopted new §299.4(a)(1) provides language from existing §299.4 that was rewritten for ease of readability. Adopted new §299.4(a)(2) provides that professional engineers shall prepare evaluations, analyses, and reports as required in this chapter. This change was made to ensure that all duties of a professional engineer are in one rule to avoid confusion. Adopted new §299.4(a)(3) includes language from existing §299.26, Construction Inspection, to ensure that all duties of a professional engineer are in one rule to avoid confusion. The commission also wants to ensure that the requirements do not conflict with contract requirements of the engineering industry. Adopted new

§299.4(a)(4) includes, in the list of duties of a professional engineer performing or supervising the engineering, inspections of high- and significant-hazard dams and large, low-hazard dams, as defined in adopted new §299.13, Size Classification Criteria, and §299.14, Hazard Classification Criteria. The commission determined that due to the size and hazard of these dams, this requirement is necessary to ensure that the engineering characteristics of the dam and appurtenant structures are being evaluated according to accepted engineering practices.

Adopted new §299.4(b) concerning waiver of requirements by the executive director includes language from the last phrase of existing §299.4 and has been rewritten for ease of readability.

Existing §299.5, Exception, is repealed and moved to the adopted new §299.5, Exception. Adopted new §299.5(a) includes language from existing §299.5 that is modified to be consistent with Texas Register requirements and agency guidelines. The term "registered engineer" is changed to "professional engineer" to agree with the term used by the Texas Board of Professional Engineers.

Language is added in §299.5(b) to identify the materials the owner would need to submit to the executive director with the exception request. This requirement clarifies the types of material needed to be submitted by the owner with the exception request.

Adopted new §299.5(c) includes language to specify the method for either approving or denying the exception request. This is necessary to provide owners and engineers with the commission's procedure for addressing exception requests.

Adopted new §299.6, Changing Ownership of Dams, includes a requirement to notify the executive director when there is a change in ownership of property that includes a dam. This requirement was recommended in the report prepared by the 1998 Executive Director's Task Force on Dam Safety and is necessary for the executive director to maintain a current list of owners and contact information in the event of an emergency. In response to comments, the commission has changed the language to indicate that the change of ownership is related to the property since the dam is located on the property and the property is transferred. Also, the commission changed the language to require the current owner to notify the new owner of the requirements to notify the commission of the change of ownership. This change is necessary for clarity.

Adopted new §299.7, Inventory of Dams, includes a requirement for the executive director to maintain an inventory of dams in Texas. The commission determined that the inventory is essential to maintaining a database for information on the dam and owner, for providing statistics on dams during the legislative process, and for continuing to receive federal funds for the Dam Safety Program. The State Auditor's Office has also recommended that this requirement is essential to the Dam Safety Program.

Existing §299.11, Classification of Dams, is repealed and moved to adopted new §299.12, Classification of Dams, for better organization of the subchapter.

Adopted new §299.11, General, concerning the evaluation of the hydrologic, hydraulic, and structural adequacy of a dam includes language from existing §299.2(b) and is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.11(1) provides that the hydrologic and hydraulic adequacy of a dam would be evaluated using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted §299.11(2) concerning a list of conditions that may endanger a dam, includes language from existing §299.2(b) and is modified to be consistent with Texas Register requirements and agency guidelines.

Existing §299.12, Size Classification Criteria, is repealed and moved to adopted new §299.13 for better organization in the subchapter.

Adopted new §299.12(a) concerning classification of dams by size and hazard and not on the condition of the dam, includes language from existing §299.11 and is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.12(b) provides that allows a dam's hazard classification to be changed at any time based on an inspection and downstream hazard evaluation by the executive director or the owner's professional engineer; a breach analysis performed by either the executive director or the owner's professional engineer; or a review of current aerial photography and topographic maps along with field confirmation. During a stakeholders meeting in 2005, stakeholders expressed frustration that it appeared that a hazard classification could not be changed and that owners would be required to upgrade dams at a considerable cost when it may not be necessary. The commission determined that there has been a process in place for changing a hazard classification and that process is included in the rules.

Existing §299.13, Hazard Classification Criteria, is repealed and moved to adopted new §299.14, Hazard Classification Criteria, for better organization in the subchapter.

Adopted new §299.13, Size Classification Criteria, includes language from existing §299.12 that is modified to be consistent with Texas Register requirements and agency guidelines and to be consistent with adopted new §299.1(a). In response to comment, the commission deleted language in the figure for height for small dams to be consistent with adopted new §299.1(a).

Existing §299.14, Hydrologic Criteria for Dams, is repealed and moved to adopted new §299.15, Hydrologic and Hydraulic Criteria for Dams, for better organization in the subchapter.

Adopted new §299.14, Hazard Classification Criteria, includes language from existing §299.13 that is modified to be consistent with Texas Register requirements and agency guidelines. Existing §299.14(b) indicated that the minimum hydrologic criteria would be based on both existing and planned future development. Stakeholders at a stakeholders meeting in 2005 indicated that designing for a future development that may not occur would be costly and recommended that the language be changed to be based on only a development existing at the time of the classification. In addition, adopted new §299.14 provides that a breach analysis could be used as part of the classification. In response to comment, the commission has added language to the rule that

the breach analysis addresses the incremental impact of the potential breach over and above the impact of the flood that may have caused the breach. This language is necessary to provide owners with guidelines for the classification of dams and make it consistent with adopted new §299.15(a)(4)(A)(i). Language is added to §299.14(1) - (3) to provide more detail for the loss of life (one to six lives or one or two inhabitable structures for significant-hazard dams and seven or more lives or three or more inhabitable structures for high-hazard dams in the breach inundation area downstream of the dam). This has been the practice of the Dam Safety Program since 1986 and has been added to rules. In response to comment, the commission has changed the word "inhabitable" in §299.14(2)(A) and (3)(A) to "habitable" for better definition and has deleted the word "important" in §299.14(2)(B)(iv) and (3)(B)(iii) to clarify the language.

Existing §299.15, Evaluation of Existing Dams, is repealed and moved to adopted new §299.16, Structural Evaluation of Dams, for better organization in the subchapter.

Adopted new §299.15(a)(1) is added to state that this subsection applies only to proposed dams to distinguish between proposed and existing dams.

Adopted new §299.15(a)(1)(A) references adopted new Figure: 30 TAC §299.15(a)(1)(A) and includes language from existing §299.14(a) and existing Figure: 30 TAC §299.14(b) that is modified for clarity and to be consistent with Texas Register requirements and agency guidelines. Existing Figure: 30 TAC §299.14(b) is also modified to change the requirements for the percentage of the probable maximum flood (PMF) for large-size, low-hazard dams, small-size, significant-hazard dams, large-size, significant-hazard dams, small-size, high-hazard dams, and intermediate-size, high-hazard dams. This is necessary to be consistent with the language in adopted new §299.15(a)(3). Language is added to adopted new Figure: 30 TAC §299.15(a)(1)(A) for interpolation of the information in the table. The upper limits for the interpolation for large dams are based on analysis of the heights of large dams in Texas (only one dam exceeds the 200-foot height) and the maximum storage capacity (300,000 acre-feet maximum storage capacity is in the middle of the maximum storage capacities for the large dams in Texas). The commission determined that dams with maximum storage capacities greater than 300,000 acre-feet should be at the upper range of the minimum hydrologic criteria. Stakeholders during the last stakeholder meeting in 2008 recommended a change in the table to provide more consistency.

Adopted new §299.15(a)(1)(B) provides that the minimum design flood hydrograph shall be based on size and hazard classification of a proposed dam at the time of the design and shall be calculated using the criteria in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted new §299.15(a)(1)(C) allows proposed dams and spillways or dams and spillway to be reconstructed, modified, enlarged, rehabilitated, or altered using hydrologic procedures of the Natural Resources Conservation Service to be acceptable, provided the procedures are shown to be equal to or more conservative than the procedures in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This is necessary to continue a policy that has been in place since 1986.

Adopted new §299.15(a)(2) provides that any dam designed to withstand overtopping without failure of the dam, including the foundation and abutments, is exempt from meeting the minimum hydrologic criteria. A dam that is designed to withstand overtopping would be armored with a material to allow overtopping without failing under any flood event. A dam with this design is exempt from meeting the minimum hydrologic criteria.

Adopted new §299.15(a)(3)(A) provides that an existing dam, that was required to pass 100% of the PMF before the effective date of these rules and is shown to pass 75% or more of the PMF by a professional engineer, would not be required to be upgraded to minimum hydrologic criteria. The dam would be considered adequate to meet the minimum hydrologic criteria provided the owner has the following: 1) an emergency action plan that meets the requirements in adopted new §299.61, Emergency Action Plans; 2) an operation and maintenance plan; 3) an inspection program; and 4) provides an annual report to the executive director, beginning 12 months after the effective date of this rule. The 1998 Executive Director's Task Force on Dam Safety and the stakeholders in the 2005 stakeholder meetings strongly recommended that existing dams should be addressed differently than proposed dams. The commission agreed and determined that many of the dams that do not meet the minimum hydrologic criteria were constructed, and possibly approved, under a previous set of rules and regulations and that a criteria of 75% of the PMF would be appropriate for the average of the extreme storms in the state. The commission also determined that the owners of these dams needed to meet additional requirements to maintain the dam in a safe manner. Nearly 40% of the high-hazard dams in Texas are considered adequate under this adoption compared to nearly 30% under the current rules. In response to comment, the commission has changed the language in adopted new §299.15(a)(3)(A) to clarify the owner's responsibilities by moving the "owner of" to the front of adopted new subparagraph (A) and rearranging the sentence structure. Additionally, the words "large or high-hazard" have been added to clarify the application of this subparagraph. In response to another comment, the commission has changed the word "program" in adopted new §299.15(a)(3)(A)(ii) to "plan" to be consistent with adopted new §299.43(a).

Adopted new §299.15(a)(3)(B) provides that a dam that was required to meet the minimum hydrologic criteria before the effective date of these rules, but is shown by a professional engineer to meet the minimum hydrologic criteria in Figure: 30 TAC §299.15(a)(1)(A), will not be required to be upgraded and the dam will be considered adequate to meet the new minimum hydrologic criteria. This is necessary to provide consistency with adopted new subsection (a)(3)(A). In response to comment, the commission has changed the language to clarify the owner's responsibilities by moving the "owner of" to the front of the subparagraph and rearranging the sentence structure.

Adopted new §299.15(a)(3)(C) includes language from existing §299.15(a) that is modified to be consistent with Texas Register requirements and agency guidelines. In addition, language is added that if an existing dam does not meet the minimum hydro-

logic criteria or if the hazard classification of an existing dam has been raised and the dam does not meet the minimum hydrologic criteria, the executive director may require the owner to submit to the executive director one of the following, prepared by a professional engineer: 1) construction plans and specifications for upgrading the dam; 2) an analysis or other option to request a reduction in the minimum hydrologic criteria; or 3) a plan for an alternative to upgrading. The stakeholders in 2005 recommended that options be made available for dam owners. The commission agreed that options needed to be available for owners to find the best solution for providing a safe dam. In response to comment, the commission has changed the language in §299.15(a)(3)(C) to clarify the owner's responsibilities by moving the "owner of" to the front of the subparagraph and rearranging the sentence structure. The commission also has changed the language in adopted new §299.15(a)(3)(C)(i) to include upgrading only to no more than 75% of the PMF and providing the requirements given in adopted new §299.15(a)(3)(A). A typographic error was also corrected in adopted new §299.15(a)(3)(C). The word "or" after "paragraph (3)(A)" is changed to "of."

Adopted new §299.15(a)(3)(D) provides language that when a dam that meets the requirements of subsection (a)(3)(A) is required to be modified due to structural deficiencies, the executive director shall require the owner to submit final construction plans and specifications for the structural modifications without having to upgrade the dam to meet the minimum hydrologic criteria. This is necessary to provide owners with guidance for upgrading dams and to avoid unnecessary modifications. In response to comment, the commission has changed the language in adopted new §299.15(a)(3)(D) to clarify the owner's responsibilities by moving the "owner of" to the front of adopted new subparagraph (D) and rearranging the sentence structure.

In response, to comment the commission has added adopted new §299.15(a)(3)(E) to provide the process for notifying the owner of requirements.

Adopted new §299.15(a)(4)(A)(i) provides that one of the options to reduce the minimum hydrologic criteria is for a breach analysis to be prepared by a professional engineer. The breach analysis would model three different scenarios and would need to demonstrate that existing downstream improvements would not be adversely affected (defined as the downstream flooding differentials being less than or equal to one foot between breach and non-breach simulations in the affected area). The commission determined that a breach analysis is a viable option for owners to use in reducing the minimum hydrologic criteria since a differential of one foot or less would not cause additional flooding or loss of life. In response to comment, the commission has changed the phrase "PMF" to "design flood" since all dams are not required to pass the PMF.

Adopted new §299.15(a)(4)(A)(ii) includes language from existing §299.14(b) and existing §299.15(b) and is modified to be consistent with Texas Register requirements and agency guidelines. Language is added that other technical options would be included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement would be necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted new §299.15(a)(4)(A)(iii) provides that one of the options to reduce the minimum hydrologic criteria would be for the owner to provide documentation of the purchase of, or an easement for, the property downstream of the dam that would be impacted by a dam failure and that the land had been dedicated for non-residential and non-commercial use. The commission determined that options need to be available for owners to find the best solutions for providing a safe dam and that this would be an acceptable non-structural option.

Adopted new §299.15(a)(4)(A)(iv) provides that one of the options to reduce the minimum hydrologic criteria would be for the owner to provide documentation that the property downstream of the dam that would be impacted by a dam failure had been dedicated for non-residential and non-commercial use. The commission determined that options need to be available for owners to find the best solutions for providing a safe dam and that this would also be an acceptable non-structural option.

Adopted new §299.15(a)(4)(B) provides a process for the executive director to review and approve the owner's request for reduction of the minimum hydrologic criteria.

Adopted new §299.15(a)(4)(C) provides a process for the executive director to deny the owner's request for reduction of the minimum hydrologic criteria.

Adopted new §299.15(b)(1) provides that the hydraulic adequacy for proposed dams or dams proposed to be reconstructed, modified, enlarged, rehabilitated, or repaired will be evaluated using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted new §299.15(b)(2) provides that an owner shall have a professional engineer address the stability of the spillways to determine if the spillways will adequately meet the minimum hydrologic criteria without being significantly damaged. The commission determined that spillway stability was not being addressed by professional engineers during evaluations of dams and spillways. Failure to ensure stability of spillways has led to spillways being severely damaged during storm events.

Adopted new §299.15(b)(3) provides that an owner's professional engineer determine minimum freeboard for proposed large dams as outlined in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that experience with dams during Hurricane Rita in 2005 indicated that freeboard could be essential during extreme storm events to prevent failure of a dam.

Adopted new §299.15(c) provides that if it would become necessary for an owner of an existing dam to reevaluate the hydraulic adequacy, the owner shall have a professional engineer evaluate the hydraulic adequacy using the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted §299.16, Interim Alternatives, is repealed and moved to adopted new §299.17, Alternatives to Upgrading Dams, for better organization in the subchapter.

Adopted new §299.16(a) concerning a requirement to submit a geotechnical, geological, and structural report to support the design of a proposed dam or a dam that is proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered includes language from existing §299.23(c), Content of Construction Plans and Specifications, that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.16(b) provides that an owner have a professional engineer develop a stability analysis as described in the most current version, at the time of the analysis, of the agency's *Design and Construction Guidelines for Dams in Texas* for proposed large- and intermediate-size dams and large and intermediate dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered and submit the analysis with the construction plans and specifications. Stability analyses are necessary to evaluate slopes on larger dams to ensure that slopes are flat enough to prevent slope failures such as slides. The commission determined that there were problems in the past due to the lack of minimum stability criteria on a critical dam. Stakeholders recommended that a guideline document would be the most appropriate place to include those criteria to allow changes to be made more easily.

Adopted new §299.16(c) provides language that allows the executive director to request that an owner of a possible deficient dam perform geotechnical, structural, or stability analyses to determine if the integrity of the dam was threatened. The commission determined that this language would be necessary to determine safety needs and possibly prevent a failure of a dam.

Adopted new §299.16(d)(1) provides language that allows the owner or the executive director to request a person that proposes to dredge a reservoir within 200 feet of a dam have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Dredging too close to a dam could result in soil seams being exposed to reservoir water that would allow water to flow under the dam or upstream slopes being disturbed. These situations could result in a failure of the dam. The 200 feet should be sufficient distance to protect the dam.

Adopted new §299.16(d)(2) includes language that allows the owner or the executive director to request a person that proposes to install a utility line or pipeline in a dam that requires significant excavation in the dam or spillways have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. These proposals need to be evaluated since utility lines and pipelines can be under pressure, and utility lines and pipelines need to be installed with a specified amount of cover, which could mean a significant depth into the dam. Utility lines and pipelines can affect the stability of the dam, and these lines could break under pressure and cause the dam to fail.

Adopted new §299.16(d)(3) includes language that allows the owner or the executive director to request a person that proposes to construct a road across a dam or spillways or within 200 feet of the dam have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. These proposals need to be evaluated since traffic on the road can exceed the design loads for the dam and could cause depressions in the dam which could result in settlement of the dam or slides from water standing in the depression. A road, if not properly designed and constructed, could affect the stability of the dam. The 200 feet should be sufficient distance to protect the dam.

Adopted new §299.16(d)(4) includes language that allows the owner or the executive director to request a person that proposes to drill oil or gas wells or perform oil or gas exploration within 500 feet of a dam have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Removal of oil and gas from a well or exploration for oil and gas could result in settlement of the foundation beneath a dam resulting in a failure of the dam. Equipment used by the drilling company could also cause damage to the dam resulting in cracking, slope failures, or possible failure of the dam. The 200 feet should be sufficient distance to protect the dam. In response to comment, the commission has added performing horizontal drilling or fracturing to the list of activities related to oil or gas exploration or drilling. These additional activities could have a detrimental effect on the integrity of the foundation, especially if too close to the dam. Additionally, the commission changed the distance from the dam to 500 feet from 200 feet.

Adopted new §299.16(d)(5) includes language that allows the owner or the executive director to request a person that proposes to blast within 1/2 mile from a dam have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised by the activity. Blasting can result in waves similar to earthquake waves. Under certain situations, blasting could result in cracks in the foundation or liquefaction of the foundation or embankment soils and failure could occur. The 1/2 mile should be sufficient distance to protect the dam.

Existing §299.17, Emergency Management, is repealed and moved to adopted new §299.61 for better organization within the chapter.

Adopted new §299.17(a) provides for alternatives to structural upgrading of a dam. The 1998 Executive Director's Task Force on Dam Safety and the stakeholders participating in the 2005 stakeholder meetings strongly recommended that there be alternatives to upgrading a dam. Structural upgrading is costly. The commission determined that many of the dams that do not meet the minimum hydrologic criteria were constructed, and possibly approved, under a previous set of rules and regulations and that a criteria of 75% of the PMF would be appropriate for the average of the extreme storms in the state. The commission also determined that the owner of the dams covered by the subsection needed to meet additional requirements to maintain the dam in a safe manner. The commission determined that alter-

natives could also include reduction of minimum hydrologic criteria according to §299.15(a)(4), removal of the dam, lowering the reservoir to a level that would allow it to meet the appropriate minimum hydrologic criteria, or a combination of structural or non-structural methods as proposed by the owner's professional engineer.

Adopted new §299.17(b) provides a process for the executive director to review the owner's alternative plan for the dam.

Existing §299.18, Variance, is repealed.

Existing §299.21, Applicability, is repealed and moved to adopted new §299.21.

Adopted new §299.21(a) concerning dams covered by the rules includes language from existing §299.21 and is modified to be consistent with Texas Register requirements and agency guidelines. Existing §299.21 indicates that the subchapter applies to dams requiring commission authorization. The existing language was not clear. The intent is that the subchapter apply to dams requiring a water rights permit authorization as provided in Texas Water Code, §11.126(c). The adopted language makes that clarification and also includes any dam that is required to obtain approval of an Edwards Aquifer protection plan. The list of dams that are subject to this subchapter is expanded to ensure that the critical dams have plans and specifications reviewed and construction monitored to prevent deficient dams from being built. The new list includes dams originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service but that are being proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired without the assistance and written concurrence of the Natural Resources Conservation Service. This situation has already occurred for 22 dams. The list of dams covered in these rules was discussed with the Natural Resources Conservation Service office in Temple before being added to the rule. The list also includes dams used for temporary detention purposes and impounding a maximum storage capacity of over 200 acre-feet. These dams would potentially be located in areas where failure could cause loss of life and the dams have not been reviewed under the language in existing §299.21, and also include small, high- and significant-hazard dams exempted from a water rights permit under Texas Water Code, §11.142. The commission determined that these dams all need to be subject to this subchapter to prevent deficient dams from being constructed. In response to comment, the commission has added dams that are used for pumped storage to the list of dams that are subject to the requirements of this subchapter to be consistent with adopted new §299.1(a). The commission also renumbered the section due to the additional language.

Adopted new §299.21(b) concerning dams excluded from these rules includes language from existing §299.21 and adopted new §299.22, Review and Approval of Construction Plans and Specifications, that is modified to be consistent with Texas Register requirements and agency guidelines. The adopted subsection clearly identifies which dams were originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service and are not subject to the subchapter. This was a concern expressed in one of the stakeholders meetings in 2005. Also, dams constructed for mining purposes and approved and inspected by the Mine Safety and Health Administration are excluded to avoid duplication of the approval process. This was also a concern expressed in one of the stakeholder meetings in 2005. Another exclusion is small, low-hazard dams exempted from a water rights permit. These dams are generally built on farms and ranches for livestock use and are not located where a failure would result in loss of life. The subsection also exempts maintenance and emergency repairs from being subject to the subchapter, which is in agreement with Texas Water Code, §11.144.

Existing §299.22, Approval of Plans and Specifications, is repealed and moved to adopted new §299.22.

Existing §299.23, Content of Construction Plans and Specifications, is repealed and moved to adopted new §299.22 and adopted new §299.16 for better organization within the subchapter.

Adopted new §299.22(a)(1) includes language from existing §299.22 that is modified to be consistent with Texas Register requirements and agency guidelines. The requirement for sealing, signing, and dating the construction plans and specifications ensures that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers. The rule ensures that the requirements do not cover emergency repairs.

Adopted new §299.22(a)(2) ensures that the commission's rules are in addition to the requirements in Texas Water Code, §11.121 and 30 TAC Chapter 213, relating to Edwards Aquifer.

Adopted new §299.22(a)(3) requires that the plans and specifications for proposed dams would not be approved by the executive director unless the plans and specifications include language, or design criteria, that require the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a Notice of Intent for coverage under the State of Texas Construction General Permit. This is necessary to ensure that the commission's rules are consistent with federal requirements and language in 30 TAC §281.25(a)(4).

Adopted new §299.22(a)(4) includes language from existing §299.22 that is modified to be consistent with Texas Register requirements and agency guidelines. The language also ensures that the commission's rules correspond to Texas Water Code, §11.126(c) and §11.144.

Adopted new §299.22(a)(5) clarifies that the construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam shall be performed according to approved construction plans and specifications unless construction change orders have been approved as indicated in proposed new §299.26, Construction Change Orders. This subsection is necessary to ensure that dams are built according to approved plans.

Adopted new §299.22(b)(1) provides for options on the size of construction plans and a requirement for a scale. The standard size of construction plans is 22 inches by 34 inches. The option of submitting half-size plans is allowed if the details are legible. This option provides a small cost savings for owners. The language on scale corresponds with Texas Water Code, §11.126(b).

Adopted new §299.22(b)(1)(A) includes language requiring a vicinity map on the construction plans. Currently, most construction plans include a vicinity map. The commission determined that a map identifying all features is essential to determine impact of the features on the dam and the dam's impact on the features. Each of the features on the vicinity map could have a significant impact on the design of the dam.

Adopted new §299.22(b)(1)(B) includes language from existing §299.23(a)(1) that is modified to be consistent with Texas Regis-

ter requirements and agency guidelines. New language requires latitude and longitude for the midpoint of the dam for ease in locating the dam in the field.

Adopted new §299.22(b)(1)(C) includes language from existing §299.23(a)(2) that is modified to be consistent with Texas Register requirements and agency guidelines. New language includes the proposed bottom of the core trench and elevations of all features. The commission determined that the core trench is essential for a dam and that the core trench be excavated into impervious material (material that is difficult for water to flow through). The elevations are critical to ensure that any potential flow is being addressed to avoid potential for failure of the dam or appurtenant structures in the future.

Adopted new §299.22(b)(1)(D) concerning inclusion of a spillway profile on the construction plans is moved from existing §299.23(a)(2) without change.

Adopted new §299.22(b)(1)(E) includes language from existing §299.23(a)(2) that is modified to be consistent with Texas Register requirements and agency guidelines. New language provides that the boring logs would only be included on the construction plans if they are not included in a separate geotechnical report, which is preferred. This is necessary so that engineers are not required to place the logs of borings on the construction plans, thereby creating insurance issues for the engineers.

Adopted new §299.22(b)(1)(F) concerning inclusion of a cross section of the dam on construction plans is moved from existing §299.23(a)(3) without change.

Adopted new §299.22(b)(1)(G) concerning inclusion of detailed sections of outlet conduits, control works, and spillways on the construction plans include language from existing §299.23(a)(4) that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.22(b)(1)(H) concerning inclusion of different types of instrumentation on the construction plans includes language from existing §299.23(a)(5) that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.22(b)(1)(I) concerning inclusion of requirements, or design criteria, for a contractor to develop a Storm Water Pollution Plan on construction plans is modified to be consistent with federal requirements and language in §281.25(a)(4).

Adopted new §299.22(b)(1)(J) includes language that requires including other design standards as described in the most current version, at the time of the evaluation, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline document would be the appropriate place to include other design standards instead of the rules. As the dam construction industry changes due to new technology, changes are more easily made in a guideline.

Adopted new §299.22(b)(2) includes language for options on the size of construction plans and for a requirement for a scale. The standard size of construction plans is 22 inches by 34 inches. The option of submitting half-size plans would be allowed if the details are legible. This option would provide a small cost savings for owners. The language on scale would correspond with Texas Water Code, §11.126(b).

Adopted new §299.22(b)(2)(A) requires a vicinity map on the construction plans. Currently, most construction plans include a vicinity map. The commission determined that a map identifying all features is essential to determine impact of the features on the dam and the dam's impact on the features. Each of the features in the language could have a significant impact on the design of the dam.

Adopted new §299.22(b)(2)(B) includes language from existing §299.23(a)(4) that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.22(b)(2)(C) includes language from existing §299.23(a)(2) that is modified to be consistent with Texas Register requirements and agency guidelines. Language is added that the boring logs would only be included on the construction plans if they are not included in a separate geotechnical report, which is preferred. This is necessary so that engineers are not required to place the logs of borings on the construction plans, thereby creating insurance issues for the engineers.

Adopted new §299.22(b)(2)(D) concerning inclusion of requirements, or design criteria, for a contractor to develop a Storm Water Pollution Plan on the construction plans is modified to be consistent with federal requirements and language in §281.25(a)(4).

Adopted new §299.22(b)(2)(E) includes language that requires including other design criteria as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline is the appropriate place to include other design criteria instead of the rules. As the dam construction industry changes due to new technology, changes are more easily made in a guideline.

Adopted new §299.22(c)(1) concerning the requirement for the various types of materials to be included in the specifications include language from existing §299.23(b)(1) that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.22(c)(2) includes language from existing §299.23(b)(3) that is modified to be consistent with Texas Register requirements and agency guidelines. Language is added that construction plans would not be substantially changed without either written approval by the executive director or notification of the changes as defined in adopted new §299.26. This is necessary to provide alternatives for construction change order processing and approval to avoid delays in construction and causing increased costs.

Adopted new §299.22(c)(3) concerning a requirement to be included in the specifications for the proposed contractor to develop a Storm Water Pollution Plan is modified to be consistent with federal requirements and language in §281.25(a)(4).

Adopted new §299.22(c)(4) includes language that requires including other design specifications as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that a guideline document is the appropriate place to include other design specifications instead of the rules. As the dam construction industry changes due to new technology, changes are more easily made in a guideline.

Adopted new §299.22(d)(1)(A) lists geotechnical, geological, and structural evaluation reports for all proposed dams and dams that are proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired that may be required for review during the executive director's review of plans and specifications. In the current review method, professional engineers are requested to submit geotechnical, geological, and structural

reports. The commission determined that these reports are necessary to properly evaluate the safety of the proposed dam.

Adopted new §299.22(d)(1)(B) concerning a stability analysis that may be required by the executive director includes language from existing §299.23(c) that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.22(d)(1)(C) includes language from existing §299.2(b) and is modified to be consistent with Texas Register requirements and agency guidelines for all proposed dams and dams that are proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. The commission determined that the procedures used in previous hydrologic and hydraulic studies needed to be reviewed and revised, and new research had been conducted on the hydrologic criteria, which would provide a more representative approach. This results in less cost to owners for upgrading dams to meet the minimum hydrologic criteria. The new procedures are included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*. This requirement is necessary to ensure that professional engineers use the most current and easily verified procedures.

Adopted new §299.22(d)(1)(D) requires a report on the proposed instrumentation for proposed large dams and existing large dams proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. Instrumentation for large dams is recommended to measure movement, settlement, pressure, and seepage flow. For large dams, this instrumentation could be critical for monitoring to prevent problems that could threaten the integrity of the dam. During construction, the instrumentation would be used to monitor increases in pressure, movement, and seepage flow. Language is included for the frequency of data collection to be included in the report because critical information could be missed if the data collection is too infrequent. In response to comment, the commission has deleted the word "or" after §299.22(d)(1)(D)(iii) to end the sentence.

Adopted new §299.22(d)(1)(E) provides requirements for reports addressing site-specific conditions. Dam sites with good geotechnical and geological conditions have already been used for dams in the past. New dam sites are becoming more difficult to locate for proposed dams as evidenced by problems experienced recently by owners' professional engineers who did not prepare site-specific reports.

Adopted new §299.22(d)(2)(A) requires a quality control and assurance plan for all proposed dams. The commission determined that many of the problems associated with dams are the result of improper construction that could have been prevented with a good quality control and assurance plan. The executive director has examples of dams constructed with limited or no quality control that have, or are currently, experiencing major problems.

Adopted new §299.22(d)(2)(B) requires a closure plan for any proposed dams that require a closure section. Closure of the dam is one of the most critical parts of the construction of a dam. It is essential that this closure section be placed properly, in the right sequence, and within a reasonable amount of time to prevent a failure of the project. The commission determined that review of this plan would be necessary to prevent problems in the future. In response to comment, the commission has added language that the plan includes the percentage of construction work that will be completed or the amount of construction that would be completed before closure would start. The additional language is necessary for clarity.

Adopted new §299.22(d)(2)(C) requires submittal of a plan, for review, for addressing emergencies that threaten the integrity of the dam for all proposed high- and significant-hazard dams during construction. History has shown that failures do occur during construction. A properly prepared emergency plan can help the owner protect his investment and protect downstream lives and property. Review of this plan is necessary to ensure that there is an appropriate method for addressing emergencies.

Adopted new §299.22(e)(1) clarifies a review process, which will be included in the most current version, at the time of the review, of the agency's *Design and Construction Guidelines for Dams in Texas*. The commission determined that this issue is of concern to professional engineers who are trying to get projects approved so that construction can start. A guideline document best addresses the issue since time frames should be flexible and may need to be easily changed.

Adopted new §299.22(e)(2) provides a process for the executive director to notify the owner of the approval of construction plans and specifications.

Adopted new §299.22(e)(2)(A) explains the approval method of a dam associated with a water rights permit. The subsection requires that the water rights permit be issued and a time limitation section be added to the water rights permit requiring construction of a proposed dam or reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be started and completed within a specified time frame before approval of the plans and specifications is given. This language ensures that the commission's rules are consistent with Texas Water Code, §11.121. These requirements are also necessary to ensure that dams are not built before the water rights permit is either issued or denied. If the permit is denied and the dam was built, it would require action to have the dam removed, which would be costly to the owner.

Adopted new §299.22(e)(2)(B) explains the approval method of a dam submitted as part of an application for an Edwards Aquifer protection plan. Included is the language that the executive director would not approve the plans and specifications for the dam until an Edwards Aquifer protection plan has been issued by the appropriate regional office. This language is necessary to ensure that dams are not built without the approval of an Edwards Aquifer protection plan.

Adopted new §299.22(e)(3) - (6) provides a process for the executive director to approve or require revisions to construction plans and specifications.

Adopted new §299.22(f)(1) requires the executive director to reevaluate the approved construction plans and specifications of a dam if construction did not commence within four years after approval. The purpose for the reevaluation is to determine if the approval may be invalid due to any changes of the rules, regulations, and accepted engineering practices, or downstream hazard classification, during the four-year period. This determination would be made regardless whether any extension of time authorization is given. The commission determined that new research or legislation could result in changes in the rules or the *Hydrologic and Hydraulic Guidelines for Dams in Texas* and the plans and specifications would no longer be valid. This requirement is necessary to ensure that the dam is built under the most current rules.

Adopted new §299.22(f)(2) provides a process for the executive director to notify the owner that the construction plans and specifications for a dam that construction had not commenced within four years of the approval would have to be resubmitted.

Adopted new §299.22(f)(3) requires the plans and specifications to meet the rules and regulations in effect at the time they are prepared.

Existing §299.24, Maintenance of Records, is repealed and moved to adopted new §299.23, Maintenance of Construction Records, for better organization within the subchapter.

Adopted new §299.23(a) includes language from existing §299.24(a) that is modified to be consistent with Texas Register requirements and agency guidelines. The requirement for maintaining construction records not only applies to construction of a proposed dam, but also to reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam. This requirement formalizes a practice that has been in place since 1986. Language on the type of construction records is added for clarity.

Adopted new §299.23(b) includes language from existing §299.24(a) that is modified to be consistent with Texas Register requirements and agency guidelines. This requirement is for high- and significant-hazard dams to ensure that owners are alerted in advance of the requirements. In response to comment, the commission has added the words "as applicable" since not all items in the list apply to all dams.

Adopted new §299.23(c) concerning the type of information to include in construction records includes language from existing §299.24(b) that is modified to be consistent with Texas Register requirements and agency guidelines. In response to comment, the commission has added the words "as applicable" since not all items in the list apply to all dams.

Adopted new §299.23(d) provides a requirement that the construction records be maintained by the owner in a secure location at the construction site or at a location designated by the owner that is immediately accessible to the owner until the completion of construction. This requirement is necessary to prevent unauthorized access to the records.

Adopted new §299.23(e) provides a requirement that after construction the owner would transfer the construction records to a permanent, secure location at a location designated by the owner that is immediately accessible to the owner. This requirement is necessary to prevent unauthorized access to the records and to allow the executive director to review all records upon request.

Existing §299.25, Construction Progress Report, is repealed and moved to adopted new §299.24, Construction Progress Reports, for better organization within the subchapter.

Adopted new §299.24, Construction Progress Reports, includes language from existing §299.25 that is modified to be consistent with Texas Register requirements and agency guidelines. A requirement is added to include the contractor's name and the name and telephone number of the professional engineer or inspector that will be on site during construction in the material submitted to the executive director. This requirement is necessary for contacting personnel at the construction site for inspections or information during construction. In response to comment, the commission has deleted "by the tenth of each month" from §299.24(b) since the word "monthly" is already used in the subsection.

Existing §299.26, Construction Inspection, is repealed and moved to adopted new §299.25, Construction Inspection, for better organization within the subchapter.

Adopted new §299.25(a) - (c) includes language from existing §299.26 that is modified to be consistent with Texas Register requirements and agency guidelines and to correspond with Texas Water Code, §12.016. Language is added to include a process for notifying the owner of deficiencies or violations and for the owner to bring the construction into compliance with the approved plans and specifications as outlined in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas*. These requirements are necessary to keep construction costs down due to a delay.

Existing §299.27, Plan and/or Specification Changes and Amendments, is repealed and moved to adopted new §299.26 for better organization within the subchapter.

Adopted new §299.26(a), (b), (d), and (e) includes language from existing §299.27 that is modified to be consistent with Texas Register requirements and agency guidelines. The term "before work commences under the changes" is removed so that critical work would not be delayed while waiting for approval. The terms "changes" and "amendments" is changed to "construction change order" to ensure that the commission's rules correspond with terms used in construction to avoid confusion of terms. Subsection (b) requires the owner to submit a construction change order for approval before the adopted changes start unless an emergency has occurred. In that case, a construction change order would be submitted after the work is performed. This is necessary to avoid costly delays in construction. The rule also requires the owner to notify the executive director by telephone or electronic mail of emergency action taken within 24 hours after becoming aware of the emergency. This requirement is necessary to allow the executive director to be aware of the emergency. Additionally, the rule requires that if the time needed for an approval of a change order will require that the construction be halted, the work may be performed once the construction change order is signed, sealed, and dated by the owner's professional engineer. The rule also requires that if the construction change order is not approved, the owner would be responsible for having the work modified to reflect the approved construction change order. This is necessary to avoid costly delays in construction.

Adopted new §299.26(c) provides the process and time frame the executive director will use to review the construction change order according to the most current version, at the time of the review, of the agency's *Design and Construction Guidelines for Dams in Texas*. These requirements are necessary for construction to continue in a timely manner and provide the method necessary to get a construction change order approved so construction would not be delayed.

Existing §299.28, Noncompliance with Approved Plans and Specifications, is repealed and moved in part to adopted new §299.25 and adopted new §299.71, Enforcement, for better organization within the chapter.

Adopted new §299.27(a) requires submittal of a written request to close the dam, prepared by a professional engineer, to the executive director to close the dam before beginning closure as described in the most current version, at the time of the closure, of the agency's *Design and Construction Guidelines for Dams in Texas*. The request would also include submittal of an emer-

gency action plan and documentation that all parts of the proposed plan for closure of the dam had been met, as described in §299.22(d)(2)(B). The commission determined that closure of a dam is a critical part of construction, and it is necessary that all essential phases of construction be completed before closure of the dam starts. This requirement of a submission requesting approval from the executive director requires the professional engineer to verify that these essential phases are complete before a request for closure of the dam would be made and the dam could be safely closed. The commission also determined that emergencies could possibly occur during this phase of construction. The requirement for an emergency action plan is necessary to ensure that the owner has a plan for warning the public downstream and taking appropriate action if an emergency occurs.

Adopted new §299.27(b) provides that the owner may begin closure of the dam after receiving written approval by the executive director. The commission made this change based on comments expressed by professional engineers on the process for approval.

Adopted new §299.27(c) includes language requiring the owner to notify the executive director that the gate operation plan had been completed with the request for closure of the dam. This is necessary to ensure that a plan for operation of the gates is in place in the event the gates would need to be operated during closure of the dam to protect the dam. In response to comment, the commission has added the words "If appropriate" to the language. Not all dams that have a closure plan have gates and need a gate operation plan.

Existing §299.29, Deliberate Impoundment, is repealed and moved to adopted new §299.2(12) and adopted new §299.28, Deliberate Impoundment, for better organization within the subchapter.

Adopted new §299.28, Deliberate Impoundment, includes language from existing §299.29 that is modified to be consistent with Texas Register requirements and agency guidelines. The requirement clarifies that the request for deliberate impoundment would be made in writing after the dam was substantially complete and that approval would be provided after the executive director verifies that construction was substantially complete according to the owner's professional engineer. The commission determined that this requirement was necessary to clarify as to when and how a request for deliberate impoundment be made.

Existing §299.30, Certificate of Completion, is repealed and moved to proposed new §299.29, Notification of Completion, for better organization within the subchapter.

Adopted new §299.29(a) includes language from existing §299.30 that is modified to be consistent with Texas Register requirements and agency guidelines and to change the time frame for notification of completion. The existing time frame for submission of the notification was immediately after construction. A time frame of 45 calendar days is more practical to allow the professional engineer additional time to ensure that the construction is substantially complete before submitting the notification. The requirement for sealing, signing, and dating the notification ensures that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers. Additional language is added to allow the professional engineer to submit the notification separate from the record drawings, which take longer to prepare and put an added burden on the professional engineer.

Adopted new §299.29(b) and (c) concerning the type of information that professional engineers and owners would include in notification of project completion include language from existing §299.30 that is modified to be consistent with Texas Register requirements and agency guidelines.

Existing §299.31, Record Drawings and Permanent Reference Mark, is repealed and moved to proposed new §299.30, Record Drawings, and adopted new §299.31, Permanent Reference Mark, for better organization within the subchapter.

Adopted new §299.30(a) includes language from existing §299.31 that is modified to be consistent with Texas Register requirements and agency guidelines and to change the time frame for submission of record drawings. The existing time frame for submission of the record drawings was as soon as possible after construction. A time frame of six months is more reasonable to allow the professional engineer additional time to ensure that all construction changes are documented before submitting the record drawings. The rule also requires the record drawings to be sealed, signed, and dated. This requirement ensures that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers.

Proposed new §299.30(b) would allow the owner to have a professional engineer submit a sealed, signed, and dated letter instead of another set of drawings if no changes were made during construction. This would reduce the cost of the project for the owner.

Adopted new §299.31, Permanent Reference Mark, includes language from existing §299.30 that is modified to be consistent with Texas Register requirements and agency guidelines. A new requirement is included to require latitude and longitude of the permanent reference mark(s) for ease in locating the mark(s) in the field. The commission determined that reference mark(s) are difficult to locate over time without such coordinates.

Adopted new §299.32, Gate Operation Plan, requires an owner of a proposed dam with a gated principal spillway to develop a gate operation plan before the completion of construction. The commission determined that proper operation of the gates is important for the safety of the public and that it is necessary to have the plan developed before the end of construction. A reservoir can fill to levels greater than the normal storage capacity during one rainfall event, and the owner would need to know what procedures to follow during the event to avoid putting downstream people at risk.

Adopted new §299.33(a) requires development of operation and maintenance procedures for proposed dams before completion of construction. Good operation and maintenance procedures will protect a dam against deterioration, prolong the dam's life, and should be initiated as soon as the dam is completed. Good operation and maintenance procedures will reduce the risk for the owner and for the downstream public.

Adopted new §299.33(b) includes a requirement that the owner of any proposed dam shall provide the date the owner will turn over the operation and maintenance to a property owners association, homeowner association, or any other designated group to the executive director. The executive director has received numerous complaints from property owners associations, homeowner associations, and other groups that ownership has been changed to the property owners association, homeowner association, and other group without the knowledge of the property owners association, homeowner association, or other group and the executive director has had difficulty locating the owner for

correcting problems at the dam. This requirement would be necessary to have the parties identified at the end of construction so there could be a continuity of maintenance to avoid deterioration of the dam.

Adopted new §299.41, Owner's Responsibilities, include language from existing §299.2(c) and existing §299.3 that is modified to be consistent with Texas Register requirements and agency guidelines. As indicated in Texas Water Code, §12.052(f), the owner of a dam is responsible for the operation and maintenance of the dam. The commission determined that the operation and maintenance of a dam is extremely important to prevent deterioration and possibly failure of the dam or appurtenant structures. Aging dams are more susceptible to deterioration. Over 89% of the dams listed in the agency's inventory of dams are over 25 years old. Therefore, the requirements for addressing maintenance items as quickly as possible have become even more important.

Adopted new §299.42(a)(1) concerning the ability of the executive director to enter a person's property for the purpose of inspecting a dam to ensure that the commission's rules correspond with Texas Water Code, §12.017.

Adopted new §299.42(a)(2) requires the periodic inspections of dams by the executive director based on hazard classification on a five-year frequency for all high- and significant-hazard dams and all large, low-hazard dams. Small and intermediate, low-hazard dams are not included in a periodic inspection schedule, but could be inspected for determining hazard classification or assessing various types of problems or conditions. The commission has determined that there are currently 1,661 high- and significant-hazard and large, low-hazard dams and that these 1,661 dams could be inspected on a five-year frequency by the current staff of seven full-time employees and through outsourcing contracts. The 1998 Executive Director's Task Force on Dam Safety also recommended a five-year frequency. The commission also determined that these dams present the greater potential for loss of life to the downstream public and should be inspected on a regular basis, instead of inspecting all of the 7,068 dams listed in the agency's inventory of dams.

Adopted new §299.42(a)(3) describe the elements that may be included in the executive director's inspection. The inspection may include a visual inspection and evaluation of the dam, appurtenant structures, and downstream area; taking measurements; taking photographs for documentation; conducting an evaluation of the hazard classification; and reviewing and evaluating the owner's operation, maintenance, inspection programs, and the emergency action plan. The commission determined that these elements are the essential parts of an inspection for evaluating the safety, integrity, and operation of a dam and appurtenant structures.

Adopted new §299.42(a)(4) provides that the executive director prepare an inspection report complete with recommendations, possibly including hydrologic, hydraulic, or structural evaluations, and send a copy to the owner. Owners have requested copies of reports so that they could determine the locations of problems and the recommendations for correcting the problems.

Adopted new §299.42(a)(5) requires the owner to respond to the executive director concerning an inspection, if requested, and to provide a plan of action with time frames for addressing all of the recommendations. The commission determined that the executive director has been using this method over the last year with considerable success and that there would be greater success if this was a requirement in the rules.

Adopted new §299.42(b)(1) requires the owner to inspect the dam and appurtenant structures on a regular time frame and during emergency events. The commission determined that regular inspections by the owner is invaluable for detecting problems at an early stage and allowing the owner to make corrections before the problems become more extensive and costly to repair. Inspections after significant rainfall events and during emergency events also help detect problems early and allow correction.

Adopted new §299.42(b)(2) requires the owner to notify the executive director by telephone or electronic mail after becoming aware of any problems or damage that pose a threat to the dam. This requirement is necessary to allow the executive director to document the problem or damage. In response to comment, the commission has changed the initial time for reporting from 24 hours to 72 hours and the time to send a letter from five days to five working days. Additionally, the word "significant" has been added before "threat." The time will allow the owner to spend the initial time working on the dam before contacting the executive director.

Adopted new §299.42(b)(3) requires the owner to submit all engineering reports prepared by the owner's professional engineer under this section to the executive director for review within 45 calendar days after receipt of the report. Language is added to require the engineering inspection report to include the date of the inspection, a description of the items observed during the inspection, findings, and recommendations. This requirement allows the executive director to review the report as soon as possible and respond to the owner so that corrections recommended by the executive director can be made with other corrections.

Adopted new §299.42(b)(4) includes language that allows the owner to have an engineering inspection by a professional engineer on a more frequent basis than described for the executive director. The executive director may use an engineering inspection report prepared by the owner's professional engineer or a professional engineer from a federal agency in lieu of making a periodic inspection. The language on the frequency of inspections by the owner was recommended in the most recent stakeholder meeting. This language was recommended by the 1998 Executive Director's Task Force on Dam Safety to avoid duplication of effort.

Adopted new §299.43, Operation and Maintenance, requires the owner to develop an operation and maintenance program. The commission determined that a good operation and maintenance program protects a dam against deterioration and prolongs the dam's life and that a poorly maintained dam will deteriorate and could fail. Nearly all parts of the dam and appurtenant structures are susceptible to deterioration if not properly maintained. The executive director has numerous examples of poorly maintained dams. This requirement is necessary to provide owners with a tool for performing maintenance on a regular basis to provide safe dams and appurtenant structures.

Adopted new §299.43(a) requires owners to implement an operation and maintenance program. Language is added that the owner may use the most current version, at the time of the evaluation, of the agency's *Guidelines for Operation and Maintenance of Dams in Texas*, a manual, checklist, or some other procedure to demonstrate implementation of the program. This requirement is necessary to have owners develop some type of operating and maintenance program using some type of proce-

dure. In response to comment, the commission has changed the word "program" to "plan." The intent of the language was that the owner develop an operation and maintenance plan.

Adopted new §299.43(a)(1) requires schedules for engineering and maintenance inspections in the owner's program. This requirement provides owners with an easy way of tracking inspections for documentation purposes.

Adopted new §299.43(a)(2) requires the inclusion of any restrictions imposed by the professional engineer's design in the operation and maintenance manual. This requirement is necessary because these restrictions are important for the safety of the dam and must be followed. In response to comment, the commission has deleted the word "original" since other design criteria may need to be included.

Adopted new §299.43(a)(3) lists the types of maintenance items to be addressed by the owner and when they should be addressed. This would allow the owner to track maintenance for each item and have an easy way to check for maintenance items. In response to comment, the commission has added the words "but not limited" to the list since there could be additional items in an operation and maintenance beside those listed.

Adopted new §299.43(a)(4) requires inclusion of a plan for monitoring any instrumentation at the dam and appurtenant structures. This allows the owner to track the instrumentation readings and know when a reading becomes critical.

Adopted new §299.43(b) requires the owner to document operation and maintenance activities undertaken and to provide the documentation to the executive director upon request of the executive director. The commission determined it is necessary for the owner to document the operation and maintenance activities for the record and that the review is best performed when requested by the executive director.

Adopted new §299.44(a) requires owners of all existing intermediate- and large-size dams with a gated principal spillway to develop a gate operation plan within two years after the effective date of the rules. The commission determined that proper operation of a gated principal spillway is important for the safety of the public and that it is necessary to have an operation plan in place so the owner knows what procedures to follow during normal operating conditions or during flood events to avoid putting people downstream at risk. The two-year time frame allows the owner time to develop the gate operation plan and to notify the executive director that the plan is either completed or that a gate operation plan already exists. Although not specifically identified in Texas Water Code, §12.052, the commission determined that gate operation plans would be part of the maintenance of dams (preserving from failure), and therefore, they are added as a requirement in the rules. In response to comment, the commission has added language to allow the owner to request an extension of time and to provide the process for requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the gate operation plan. The commission determined that the two-year time frame may be too short for some owners. In response to another comment, the commission has deleted the word "principal" since other spillways could have gates and changed the word "their" to "a" to agree with the language.

Adopted new §299.44(b) lists the gate regulating procedures and a method for coordinating releases, if applicable, that need to be included in the gate operation plan. The commission determined that these requirements are the most important parts of a gate operation plan and that the owner needs to have a plan to follow during normal operating conditions, flood events, and power failures. In response to comment, the commission has added "other varying hydrologic events" since there may be other events that need to be addressed in a gate operation plan.

Adopted new §299.44(c) provides that the gate operation plan is an appendix to the emergency action plan. A gate operation plan is considered an integral part of the emergency action plan since it includes the procedures to follow during an emergency operation of the gates. Language is added to require that if the owner submits a copy of the gate operation plan, the executive director shall file it with the owner's emergency action plan in the agency's confidential, permanent records. The Office of the Attorney General determined in a letter opinion in 2005 that emergency action plans are considered confidential and are not subject to public information requests. A gate operation plan is considered an integral part of that plan.

Adopted new §299.45(a) would require an owner to make emergency repairs under the supervision of a professional engineer and implement the emergency action plan as soon as possible after the emergency is discovered and evaluated without having to obtain approval from the executive director. The commission determined that it is essential that repairs are initiated as quickly as possible to avoid more significant damage or a failure and that the emergency action plan is implemented to alert the downstream public.

Adopted new §299.45(b) requires the owner to notify the executive director by telephone or electronic mail within 12 hours after the emergency is discovered and evaluated. This requirement is necessary to allow the executive director to be aware of the emergency. In response to comment, the commission has added the word "facsimile" to the list of ways to notify the executive director since there are other ways for notification.

Adopted new §299.45(c) requires the owner to have a professional engineer develop plans for permanent repairs after the emergency repairs are completed and submit the plans for review and approval. This requirement is necessary to be consistent with requirements of the Texas Board of Professional Engineers.

Adopted new §299.46(a) requires the owner to maintain records and reports, if available, on the inspection, operation, and maintenance of the dam. This requirement is necessary to provide a historical record of the dam in the event problems develop and a record of all features at the dam. The commission determined that in the event of a problem, records have been invaluable in developing corrections to the problems.

Adopted new §299.46(b) includes a requirement that legible or electronic copies be maintained by the owner in a secure location designated by the owner that is accessible to the owner for the life of the dam.

Adopted new §299.46(c) includes a requirement that the records, or access to the records, shall be provided to the executive director upon request. This requirement is necessary to prevent unauthorized access to the records and to allow the executive director to determine if the dam is being inspected, operated, and maintained according to the requirements in the rules and accepted engineering practices.

Adopted new §299.46(d) includes a new requirement that an owner shall transfer all records to a new owner when there is

an ownership change. This requirement is necessary to ensure that the new owner has access to all records.

Existing §299.51, Removal of Dams and Reservoirs, is repealed and moved to adopted new §299.51, Removal or Breach of Dams, for better organization within the subchapter.

Adopted new §299.51(a) requires that the owner is required to submit plans to the executive director for the removal or breaching of a dam. This requirement is necessary to be consistent with other sections in the rules and to ensure that the removal or breach is properly designed.

Adopted new §299.51(b) requires that the owner have a professional engineer submit plans for the removal or breach of a dam as outlined in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*. The commission determined that removing or breaching a dam could alter the flood characteristics of the stream and could endanger downstream lives and property if not performed properly and that all items in the guidelines should be addressed to provide a safe situation to downstream lives and property. The requirement for sealing, signing, and dating the removal or breach plans ensures that the commission's rules correspond to the requirements of the Texas Board of Professional Engineers.

Adopted new §299.51(c) provides that the owner may also be required to address environmental and social impacts for the removal or breach of a dam as described in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*, which may require approval from other agencies before construction can begin. The commission determined that removing or breaching a dam could alter the environment and increase property or human health and safety concerns downstream if not performed properly and that all items needed to be addressed to minimize the risk downstream. The commission also determined that the executive director's approval may not be the only approval necessary to perform the removal or breach of a dam. In response to comment, the commission has changed the word "construction" to "work" for better clarity.

Adopted new §299.51(d) provides that the owner may be required to restore the property to the condition of the site before the dam was constructed. The commission determined that there are cases where a dam may exist on property not owned by the dam owner and the property owner may require the dam owner to restore the property to pre-construction conditions. In response to comment, the commission has changed language to indicate that the owner may be required to restore the dam site to blend with the topography of the lake area. Only the dam site may need to be restored, not the entire property.

Adopted new §299.51(e) concerning the requirements for written approval of dam removal include language for the review and approval method for removal or breaching a dam. This is necessary to provide owners with a review process.

Adopted new §299.51(f) requires that an owner shall provide the executive director within 45 days of completion of the breach or removal a notification of completion. Language also requires that an inspection be conducted to verify that the dam had been removed or breached. The commission determined that it is necessary for the owner to notify the executive director so the executive director can verify that the work had been completed according to the approved plans to avoid a partially removed or partially breached dam being left in place that could cause problems downstream if the breach enlarged or continued to cut down, releasing additional waters downstream.

Adopted new §299.52, Abandonment of Dams, includes language from existing §299.2(c) and is modified to be consistent with Texas Register requirements and agency guidelines. Language is included to provide that it is the owner's responsibility to remove or breach the dam at the owner's expense. In response to comment, the commission has added "regardless of hazard classification" to clarify that any dam that is abandoned is subject to the requirement.

Existing §299.61, Emergency Action, is repealed and moved to adopted new §299.72, Emergency Orders, for better organization within the chapter.

Adopted new §299.61(a) requires owners of all high- and significant-hazard dams to prepare an emergency action plan to follow in the event of, or threat of, a dam emergency. Emergency action plans are essential to provide owners with a plan for promptly responding during an emergency and minimizing consequences. An emergency may occur with little or no warning, thereby providing minimal time to assess and respond. These plans are designed to minimize impacts and reduce reaction time. The commission determined that the need for emergency action plans is one of the most critical requirements needed for existing dams.

Adopted new §299.61(b) includes a requirement that gives the owner two years to submit the emergency action plan after the effective date of the rules. There are 1,654 dams that are currently listed as high- and significant-hazards dams. Currently, there are only 136 high- and significant-hazard dams that have been documented by the executive director as having an emergency action plan. The owners need time to develop the emergency action plans. In response to comment, the commission has added language to allow the owner to request an extension of time according to the process in §299.61(d). The commission determined that the two-year time frame may be too short for some owners.

Adopted new §299.61(c) includes a requirement that a plan for addressing emergencies during construction of a proposed high- or significant-hazard dam be submitted for review before either requesting closure of the dam or upon completion of construction of the dam, if the dam does not require a closure section. History has shown that failures do occur during construction. A properly prepared emergency action plan can help the owners protect their investment and protect downstream lives and property. Review of the plan is necessary to ensure that there is a method for addressing emergencies.

Adopted new §299.61(d) includes language that the owner should use guidelines provided by the executive director or a format approved by the executive director before starting the plan. A guideline provides consistency between emergency action plans. The commission determined that different guidelines will be provided depending on the size of the dam. In response to comment, the commission has added language to allow the owner to request an extension of time and to provide the process for requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the emergency action plan. The two-year time frame may be too short for some owners.

Adopted new §299.61(e) concerns the review method for reviewing an emergency action plan. This is necessary to provide the process for review of the emergency action plan.

Adopted new §299.61(f) requires that the emergency action plan be filed in the agency's confidential, permanent records. The Office of the Attorney General determined in an opinion letter in

2005 that emergency action plans are considered confidential and are not subject to public information requests.

Adopted new §299.61(g) requires that the owner review the emergency action plan annually, update the emergency action plan as necessary, and submit annual updates to the executive director beginning three years after the effective date of these rules. This requirement is necessary since personnel change and new personnel need to be trained in order to react properly during an emergency and to provide a time frame for the owner to submit any updates. Language is also added that if the emergency action plan had been reviewed and the owner determined that no updates were necessary, the owner is required to notify the executive director in writing if updates to the emergency action plan had not been adopted or implemented. This requirement is necessary to ensure that the owner is reviewing the emergency action plan.

Adopted new §299.61(h) includes language requiring a table top exercise of the emergency action plan on a frequency no greater than five years. The success of an emergency action plan will often depend upon the training of employees, including periodic exercises. All parties need to know their roles and responsibilities. This requirement is necessary for the protection of the downstream public. In response to comment, the commission has added a definition to §299.61(h) for "table top exercise" so all parties understand what is being required.

Adopted new §299.62, Security of Dams, includes a requirement that owners of high-hazard dams, that may need increased security due to the critical nature of the dam and reservoir, shall address security at their dams after being notified in writing by the executive director within six months of the effective date of these rules to prevent unauthorized operation or access and meet backup power requirements to ensure operation of the dam and appurtenant structures. The requirement is for these owners to develop a security plan within two years of being notified by the executive director and submit the plan to the executive director for review. The security plan will be filed in the confidential, permanent records of the executive director. If a request for a security plan is received, the executive director will file a request for an opinion from the Office of the Attorney General under Texas Government Code, §418.182. Over half of the dams identified by the executive director as being dams with increased security needs, have already had a security inspection and have been advised of security needs. The commission determined that security plans need to be developed on these dams because of their importance in the state. The commission also determined that backup power requirements need to be addressed by owners in the event of a power failure. This became evident during Hurricane Rita in 2005, when one owner had to operate spillway gates with backup power to prevent further damage to the dam. The commission further determined that it was necessary to provide a time frame for notifying the owners and to provide the owners time to begin the process of addressing security. Although not specifically identified in Texas Water Code, §12.052, the commission determined that security plans would be part of the maintenance of dams (preserving from failure), and therefore, they are added as a requirement in the rules. In response to comment, the commission has added language to adopted new §299.62(b) to allow the owner to request an extension of time and to provide the process of requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the security plan. The two-year time frame may be too short for some owners.

Adopted new §299.71, Enforcement, includes language from existing §299.2(a) and existing §299.28 that is modified to be consistent with Texas Register requirements and agency guidelines.

Adopted new §299.72, Emergency Orders, includes language from existing §299.61 that is modified to be consistent with Texas Register requirements and agency guidelines, and to correspond with Texas Water Code, Chapter 35.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission determined that a regulatory analysis under Texas Government Code, §2001.0225, is not necessary for this rulemaking since these adopted new rules do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking is to provide greater clarity in rules relating to the Dam Safety Program, and increased protection of public health and safety due to new requirements for emergency action plans, gate operations plans, security plans, and increased inspection requirements.

While these rules could result in protection of the environment, the primary intent of the rules is to protect property and human health and safety as provided under Texas Water Code, §12.052(d). These adopted new rules are also not intended to reduce risks to human health from environmental exposure, but are instead intended to reduce risks to property and humans from the failure of a dam. Revising and clarifying the dam safety rules do not have any adverse effects on the environment or public health and safety of the state or section of the state; rather, a more detailed outline of the process for classification, construction, upgrading, removal, and emergency management of dams should improve the public health and safety of the state or a sector of the state.

Even if this adopted rulemaking could be interpreted as specifically intending to protect the environment or reduce risks to human health from environmental exposure, these adopted new rules do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. While costs for maintenance and construction of dams may increase for many owners, improvement in dam safety will save money in the long run. The costs from dam failures could be great. These rules should not adversely impact the economy, competition, or jobs.

Additionally, even if this rulemaking could be construed to be a "major environmental rule," the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement between the state and federal law, and is not adopted solely under the agency's general powers. These new rules reflect accepted engineering practices. Based on this assessment, the adopted rulemaking does not constitute a major environmental rule that falls within the applicability of Texas Government Code, §2001.0225, and thus is not subject to the regulatory analysis provisions of §2001.0225.

The commission invited public comment regarding this draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted new rules and performed an assessment of whether these adopted new rules constitute a takings under Texas Government Code, Chapter 2007. The primary purpose of this adopted rulemaking is to provide clarity and specificity, and to add requirements reflecting the best practices of accepted engineering practices for the classification, design, construction, upgrading, repair, removal, and emergency management of dams and reservoirs. The adopted rulemaking substantially advances these stated purposes because the adopted rules provide more detail and specificity. They do implement current engineering industry standards, such as outlining the process for removal of a dam and adding requirements for emergency action plans, gate operation plans, and security plans. There are no feasible alternatives because these requirements are necessary to protect human health and safety.

Promulgation and enforcement of these adopted new rules are neither a statutory nor a constitutional taking of private real property. The adopted new rules do not affect a landowner's rights in private real property, in whole or in part, temporarily or permanently. These adopted new rules do not burden, restrict, or limit the owner's right to property nor will it reduce the land value by 25% or more beyond that which would otherwise exist in the absence of the new rules. These adopted new rules do not change the classification of an existing dam and reservoir; instead, the adopted new rules initiate requirements upon owners, such as creating a security plan, a gate operation plan, an emergency action plan, and an operation and maintenance program. Therefore, there are no burdens imposed on private real property, and the benefits to the state are more modern dam and reservoir rules, which should result in safer dams in the State of Texas. For these reasons, the adopted new rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENTS

The commission held a public hearing in Austin on August 19, 2008. There were no comments received at the public hearing. The comment period closed on August 25, 2008.

The following commenters provided written comments: Brazos River Authority (BRA); City of Austin (COA); Colorado River Municipal Water District (CRMWD); Freese and Nichols, Inc. (FNI); Lloyd Gosselink Rochelle & Townsend, P. C. (LGRT); Lower Colorado River Authority (LCRA); Luminant Power (LP); Texas and Southwestern Cattle Raisers Association (TSCRA); and Texas Water Conservation Association (TWCA).

RESPONSE TO COMMENTS

General

LGRT acknowledged "the hard work and effort by the Executive Director's staff in developing the proposed Rules" and commended the commission for allowing stakeholders "to be actively involved in this process."

The commission appreciates the comment.

LCRA indicated that the "comprehensive approach taken by the proposed rules is a positive step" and "the commission and staff are to be commended for the inclusive process utilized to strengthen and improve the provisions of Chapter 299."

The commission appreciates the comment.

TSCRA expressed support for the proposed rules and appreciation for the hard work of the staff.

The commission appreciates the comment.

TWCA expressed appreciation for TCEQ's effort to promote dam safety in the state and for recognizing the need for updating the rules.

The commission appreciates the comment.

LCRA indicated that there are several guidelines proposed and suggested that the rules include a formal process, including stakeholder participation, in the development of the guidelines.

The commission responds that the commission forwarded the guidelines to stakeholders for review and comment before final publication. Also, the guidelines require stakeholder review and comment for future guidelines before being changed. No changes were made to the rules in response to this comment.

LCRA suggested that consideration should be given to provide more guidance for exceptions to the rules.

The commission responds that §299.5 provides that an exception be granted if the executive director determines that the physical conditions involved or consequences of potential failure, when evaluated using accepted engineering practices, make the requirements unnecessary. This requirement provides enough specificity to be reasonable and enough flexibility to allow the executive director to make exceptions when necessary. No changes were made to the rules in response to this comment.

LCRA recommended that all sensitive information on "critical infrastructure" dams be maintained in the executive director's confidential files and include a definition for "critical infrastructure" dams.

The commission acknowledges the comments. The executive director includes all sensitive material that the Office of the Attorney General has indicated is not to be released to the public and any material that is declared to be confidential by the dam owner but has not been reviewed by the Office of the Attorney General that we believe could be confidential under the Texas and Federal Homeland Security Act in the confidential files. A definition has not been included since the term is not used in the rule. No changes were made to the rules in response to this comment.

CRMWD and TWCA indicated that there should be a separate category for lined earthen storage reservoirs or pumped storage reservoirs if such remain subject to the proposed rules.

The commission responds that pumped storage facilities, whether lined or unlined, are considered dams under this set of rules. In response to this comment, the commission has added a definition for pumped storage facilities in §299.2(51), and has added language referring to pumped storage facilities

to §299.1(4) and §299.21(a)(4) to indicate that these rules are applicable to these facilities.

FNI requested language that would clarify that dams that meet the size requirements, but are exempt from a water right permit are still responsible for meeting the safety requirement, but do not have to submit plans for approval if they are low-hazard.

The commission agrees with the comment. Although the rules include language in §299.1(d) and §299.21(b)(4), that addresses this comment, the language is not clear. Therefore, language was added to §299.1(d) to include dams that do not require a water right permit. Additional changes were made to address sentence structure and clarity of words due to the language change.

FNI requested that a definition be added for executive director.

The commission responds that §299.2 references 30 TAC §3.2, which provides a definition for executive director. No changes were made to the rules in response to this comment.

Regarding Costs to State and Local Government, TWCA indicated that there is a conflict between the language in this section and the rule. The language in this section indicates the executive director would review and approve emergency action plans, gate operation plans, and security plans and the rule does not require a review and approval.

The commission agrees that the rule does not require review and approval of the listed plans. Although there was a conflict in language, this conflict did not affect the estimation of costs provided in the section.

Regarding Costs to State and Local Government, TWCA indicated that the costs quoted for state agencies and local governments and the costs for individuals and businesses are grossly misstated and suggested that a survey be conducted to determine a more accurate accounting of costs before the rules are implemented.

The commission appreciates the comment. However, the costs are average costs over the total of small, intermediate, and large dams. While the costs for larger dams may be more than the costs quoted per dam, the costs for smaller dams, which is the largest number of dams, is considerably smaller. The commission believes that it has adequate information on which to make this average estimation. No changes were made to the rules in response to this comment.

Regarding Costs to State and Local Government, TWCA indicated that they are concerned with the commission's ability to attract, train, and retain qualified staff to oversee and implement the rules.

The commission appreciates the comment. However, no changes are made in response to the comment since this is outside the scope of this rulemaking.

Regarding the Takings Impact Assessment, TWCA indicated that the Taking Impact Assessment is in conflict with the rule. TWCA indicated that the assessment states that the new rules do not change the classification of an existing dam and reservoir whereas the rule in §299.12(b) allows the executive director to re-classify the hazard classification of a dam at any time.

The commission acknowledges the comment. The intent of the cited language in the assessment was to state that the rule could not be a burden on private real property because the rule does not require dams to be automatically reclassified upon approval of the rule. The rule does clarify that the hazard classification may be changed due to an increase in downstream development or removal of downstream development. This requirement for change in hazard classification existed prior to the rulemaking, does not burden private real property, and is necessary for public health and safety. No changes were made to the rules in response to this comment.

Section by Section

Regarding §299.1(c)(5), CRMWD and LGRT requested clarification of the term "tanks."

The commission agrees that further clarification is necessary and has changed the language of this section as a result of the comments. The chapter does not apply to above ground storage tanks that include steel, concrete, or plastic tanks used to store water or other liquids, but does apply to earth embankments.

Regarding §299.2(5), FNI indicated that the word "of" in the first line should be "or."

The commission agrees with the comment and has changed the language.

Regarding §299.2(6), FNI indicated that the word "analyses" in the first line should be "analysis."

The commission agrees with the comment and has changed the language.

Regarding §299.2(8), LGRT suggested that the definition of "closure of dam" needs to be clarified since backfill implies only earth material can be used for closure of a dam.

The commission agrees that the definition needs to be clarified. The word "backfill" is changed to "material."

Regarding §299.2(10), LCRA requests clarification of whether land clearing constitutes start of construction or if additional work would be required to constitute "commencement of construction."

The commission responds that the definition states that any activity other than planning or land acquisition would be considered commencement of construction. Land clearing or excavation would be considered commencement of construction. No changes were made to the rules in response to this comment.

Regarding §299.2(12), FNI stated that the definition for construction should also include "modifying" an existing dam.

The commission responds that there are separate definitions for "modification," "alteration," "rehabilitation," "reconstruction," and "repair" that cover existing dams. No changes were made to the rules in response to this comment.

Regarding §299.2(16), LGRT, the definition of "deficient dam," suggested that the word "significant" be inserted in the definition before the word "threat."

The commission agrees with the comment and has made the suggested change to be consistent with other sections of the rule.

Regarding §299.2(18), LCRA suggested that the definition of design flood include the phrase "including all lesser floods" after the words "design flood."

The commission responds that the design flood is a flood used to design the dam and appurtenant structures and does not include "lesser" floods. No changes were made to the rules in response to this comment.

Regarding §299.2(32), the definition of "loss of life," LCRA indicated that the definition should be clarified.

The commission agrees that the language should be clarified. The phrase "flood-induced or piping" has been deleted since there could be other causes for failure and the phrase "without considering evacuation or other emergency actions that could be taken" was changed to "without considering the mitigation of loss of life that could occur with evacuation or other emergency actions."

Regarding §299.2(41), FNI suggested that the definition of "NAD83 conus datum" include the potential for any future upgrades.

The commission agrees with the comment and has made the suggested change.

Regarding §299.2(49), LGRT indicated that the experience requirement included with the definition of professional engineer should be removed.

The commission acknowledges the comment. As part of the rule development process, the executive director met with the staff of the Texas Board of Professional Engineers to discuss requirements for professional engineers. It was their recommendation that experience be included in the language. No changes were made to the rules in response to this comment.

Regarding §299.3(a), FNI suggested that written guidelines be developed to help owners know when they need an independent team of experts.

The commission agrees with the comment and has included language concerning when an independent team of experts may be needed in the *Design and Construction Guidelines for Dams in Texas*. No changes were made to the rules in response to this comment.

Regarding §299.6, TSCRA suggested that the requirements for "changing ownership of dams" include at the closing of a land sale.

The commission agrees with the comment and changed the language to include the suggestion and to clarify the language. The language has been changed to "when there is a change in ownership of the property which includes a dam, the previous owner shall include notification in the transaction to the new owner that the new owner. . . ."

Regarding §299.6(4), LGRT suggested that clarification should be given concerning whether for a change in ownership of a dam owners may simply submit deeds of record or if there must be some explicit reference therein to dams located on the property.

The commission agrees that the language needs clarification and has added "and property on which the dam is located." The deed does not need to reference the dam.

Regarding §299.7, LCRA indicated that dam owners should be provided a copy of the inventory information for their dam(s) to ensure data awareness and owner awareness.

The commission responds that this is not a rule issue and that the owner can request the information at any time. No changes were made to the rules in response to this comment.

Regarding §299.12, LGRT asked if the executive director will notify a dam owner when there is a reclassification of hazard for his dam and how much time will be granted to address any improvements or alterations needed to comply with the reclassification.

The commission responds that the executive director will notify the owner if there is a reclassification of the hazard. The owner will then be requested to provide a timeline for addressing any modifications or improvements that may be needed. A specific time will need to be considered for each dam due to the circumstances. No changes were made to the rules in response to this comment.

Regarding §299.12, TWCA suggested that language be changed to indicate that reclassification be based on a risk assessment that includes a cost benefit analysis of not reclassifying the dam.

The commission acknowledges the comment. The rules include use of other technical options the owner can use in assessing hazard classification. If the owner disagrees with the hazard classification assigned as a result of an inspection, the owner can pursue one of the options provided in §299.15(a)(4). The options in the rule refer to the options in the *Hydrologic and Hydraulic Guidelines for Dams in Texas*, which includes a risk assessment. A risk assessment can be submitted to the executive director for review. No changes were made to the rules in response to this comment.

Regarding Figure: 30 TAC §299.13, COA indicated that there appeared to be a mistake in the table for the "small" classification since it did not appear to agree with the language in §299.1.

The commission agrees that the language in the table does not agree with §299.1 and should read "greater than six feet." Therefore, the language in Figure: 30 TAC §299.13 has been changed to be consistent with §299.1. No changes other than to the Figure were made to the rules in response to this comment.

Regarding §299.14, FNI stated that hazard should be based on the incremental impact of the breach and suggested that the language should include the statement that "the hazard classification is based on the incremental impact of the potential breach over and above the impact of the flood that may have caused the breach."

The commission agrees that the language needs to be clarified. However, the commission does not agree that all hazard classifications should be based on a breach analysis. The commission agrees that a breach analysis should be an option that an owner can use. Therefore, the language has been added that "the hazard classification may include use of a breach analysis that addresses the incremental impact of the potential breach over and above the impact of the flood that may have caused the breach, . . ."

Regarding §299.14 and §299.15, TWCA indicated that rules do not address how the commission will manage compliance with the rules for owners of existing dams and recommended that language be added to clearly define how the executive director will manage compliance for existing dams.

The commission agrees with the comment. The language in §299.15(a)(3) has been changed to clarify the owner's responsibilities by moving the "owner of" to the front of subparagraphs (A), (B), (C), and (D) and rearranging the sentence structure. Section 299.15(a)(3)(E) has also been added to provide the process for notifying the owner of requirements.

Regarding §299.14(2)(A) and §299.14(3)(A), FNI commented that addition of number of houses to determine hazard classification in the rule is a significant improvement in clarity.

The commission appreciates the comment.

Regarding §299.14(2)(A), LCRA suggested that the word "inhabitable" be changed to "habitable" to be more descriptive and for clarity.

The commission agrees with the suggestion and has made the changes in this paragraph and in §299.14(1)(A) and (3)(A), which use the same word.

Regarding §299.14(3)(B)(iii), LCRA recommended that the rules define what are considered "important" utilities.

The commission agrees that the use of the word "important" is not clear. Therefore, the word "important" will be removed from both §299.14(2)(B)(iv) and (3)(B)(iii), which include the same word. The word is unnecessary.

Regarding §299.15(a)(3)(A), FNI and TWCA indicated that the language does not seem to allow for upgrades to be only to 75% of the PMF.

The commission agrees with the comment. The language in §299.15(a)(3)(C)(i) has been changed to include upgrading only to no more than 75% of the PMF and providing the requirements given in paragraph (3)(A).

Regarding §299.15(a)(4)(A), LGRT indicated that there is no time frame for the executive director addressing a submission for reduction in the minimum hydrologic criteria.

The commission responds that time frames are best addressed in guidelines because the time frames can be changed as necessary. The time frames are given in *Design and Construction Guidelines for Dams in Texas*. No changes were made to the rules in response to this comment.

Regarding §299.15(a)(4)(A)(i), FNI indicated that the breach analysis should refer to the design storm event rather than the PMF.

The commission agrees with the comment and has made the suggested change. The design flood is the appropriate language since all dams are not required to pass the PMF.

Regarding §299.16(d), LGRT indicated that the dam owner may not be aware of the activities and may not have jurisdiction to address preparation of the engineer evaluation report. LGRT also indicated that the burden of enforcement should not be placed on the owner.

The commission acknowledges the comment and agrees that the owner may not always be able to request a report. This subsection is not a requirement for the owner. Additionally, the rule would allow the owner to request that executive director request the report. No changes were made to the rules in response to this comment.

Regarding §299.16(d), TWCA suggested that the executive director coordinate review and adoption of this subsection with other agencies that oversee permitting of these activities.

The commission acknowledges the comment and will do its best to coordinate these activities. No changes were made to the rules in response to this comment.

Regarding §299.16(d)(4), LP suggested expanding the applicability of the engineer evaluation from a minimum of 200 feet to 500 feet and include activities such as horizontal drilling or fracturing.

The commission agrees with the comment. Horizontal drilling and fracturing for oil or gas production could have a detrimental affect on the integrity of the foundation if the work is too close to the dam. The suggested changes are made in response to the comment.

Regarding §299.16(d)(5), BRA indicated that dam owners may have no control over blasting activities on other's property so compliance with this requirement may not be possible.

The commission acknowledges the comment and agrees that the owner may not have control over blasting activities on other's property. This paragraph is not a requirement for the owner. Additionally, the rule would allow the owner to request that executive director request the report. No changes were made to the rules in response to this comment.

Regarding §299.17, (identified mistakenly as §299.2(b)), TWCA indicated that the language was unclear as to the type of alternatives that can be considered and the approval process. TWCA indicated by electronic mail that TWCA was concerned by the use of the word "or" and whether that word was implied after each paragraph.

The commission acknowledges the comment. The word "or" is implied after each paragraph. The commission has determined that the process is best given in guidelines. The *Design and Construction Guidelines for Dams in Texas* includes the process for approval.

Regarding §§299.21 - 299.31, LGRT and TWCA expressed concern that time frames should be included for review and approval of owner submittals.

The commission responds that the time frames are best given in guidelines because they can be more easily changed. The *Design and Construction Guidelines for Dams in Texas* includes this information. No changes were made to the rule in response to the comment.

Regarding §299.22(d), LGRT indicated that there are a number of reports that the owner may be required to submit as part of the plan and specification submittal. LGRT requested more specifics on what reports are required for each type of dam.

The commission responds that this information is best given in guidelines. The *Design and Construction Guidelines for Dams in Texas* includes this information. No changes were to the rule in response to this comment.

Regarding §299.22(d)(1)(D)(iii), FNI suggested that the word "or" be deleted from the end of the line.

The commission agrees with the comments and has made the suggested change.

Regarding §299.22(d)(2)(B)(i), CRMWD indicated that the language would imply that the entire fill section of the dam would have to be completed before submitting a closure plan.

The commission agrees that the language needs to be clarified. The closure plan is to be submitted with the construction plans and specifications, not when the dam is ready to be closed. The closure plan will be approved with the construction plans and specifications, and the request for approval to close will be done by a written request from the professional engineer. The intent of the rule is that the closure plan include either the percentage of the construction work that will be completed, or the amount of work that would be completed before the closure would begin. Additional language was included in the rule to clarify this in response to the comment.

Regarding §299.23(b) and (c), FNI recommended the words "as applicable" be added before each list of requirements for

records, since all items in the lists are not applicable for all projects.

The commission agrees and has changed the language in the rule as requested.

Regarding §299.24(b), FNI and LGRT suggested deleting the phrase "by the tenth of each month" since the language already uses the term "monthly."

The commission agrees with the comment and has changed the language in the rule as requested.

Regarding §299.27(a)(2), CRMWD suggested that a specified time limit should be included in the rule for a review of a closure plan to avoid putting the dam at risk waiting for a long approval.

The commission responds that the rule does not require a long review process since the closure plan would be approved during review of the construction plan before work starts. The requirement in §299.27(a)(2) is that the owner's professional engineer submit a written request to close. The approval will be completed within 24 hours after receipt provided all required material is included with the request. These requirements are included in the *Design and Construction Guidelines for Dams in Texas*. No changes were made in the rules in response to this comment.

Regarding §299.27(c), FNI recommended that the words "if appropriate" be added to the first of the sentence since not all dams that have a closure plan need a gate operation plan.

The commission agrees with the comment and the language in the rule has been changed.

Regarding §299.28(b), FNI stated that significant impoundment usually starts with the beginning of the closure section and that a statement of substantial completion cannot be submitted before then.

The commission responds that usually, impoundment is not started with the beginning of the closure since a low flow valve is open to allow the stream flows to go downstream without jeopardizing the placement of soil in the closure. The valve is then not closed until completion of the closure section. No changes were made in the rules in response to this comment.

Regarding §299.31, LP requested clarification whether a permanent reference mark needs to be established for minor repairs.

The commission responds that a permanent reference mark is not needed for a minor repair project. As indicated in the definitions, minor repairs would be classified as maintenance. The term "repaired" refers to major repairs that affect the structural integrity of the dam. No changes were made in the rules in response to this comment.

Regarding §299.32, TWCA suggested that in lieu of submitting the plan to the executive director, that the plan be kept in a secure location and be made available to the executive director at the offices of the owner.

The commission acknowledges the comment. The rule does not require submission of the gate operation plan to the executive director. If the owner decides to send the plan to the executive director, it will be placed with the emergency action plan as an appendix. No comments will be submitted to the owner. Therefore, the owner can maintain the plan at his office. No changes were made in the rules in response to this comment.

Regarding §299.32 and §299.33, LGRT has indicated that these two sections are redundant since both are included in Subchapter D of these rules.

The commission acknowledges the comment. The two sections are included in Subchapter C to provide owners and engineers with all requirements for proposed dams in one area, including dams with gated spillways and the need for an operation and maintenance plan after construction of a new dam. The sections reference the sections in Subchapter D. No changes were made in the rules in response to this comment.

Regarding §299.42(b)(1), COA expressed concern about this requirement for inspections of dams due to the large number of dams they own. The COA requested a definition for significant rainfall events and also a time frame to conduct rain event inspections. The COA also asked which dams would be under this requirement.

The commission acknowledges the comment. The COA should develop an inspection schedule as part of their operation and maintenance plan. This schedule would also include inspections during rain events. Since a certain size rain event may be different for different dams, a definition will not be given in the rule; however, this can be defined in the inspection schedule. The inspection for each dam after an event may be different due to the type of dam; therefore, the timing should also be contained in the inspections schedule. This requirement only applies to dams covered by this chapter as indicated in §299.1. No changes were made in the rules in response to this comment.

Regarding §299.42(b)(2), FNI recommended the word "significant" be added before the word "threat." LP expressed concerns that the time frame to report problems is too short and will result in problems that are minor be reported on a weekend. LP recommended that the term "24" be changed to "72" and that written notification be completed in "5 business" days.

The commission agrees with FNI and has made the suggested changes. The intent of the rule is that the owner notifies the executive director when significant problems are noted. Therefore, the commission agrees with the comments from LP and has changed the language to include five working days.

Regarding §299.43(a), FNI indicated that the language concerning the requirement for an operation and maintenance program is for all dams rather than high and significant hazard dams, but does not require submission of an operation and maintenance plan.

The commission agrees with the comment. The word "program" was used in the rule instead of "plan." The commission intended to require an operation and maintenance plan in this rule. Therefore, the language was changed to "plan" to agree with the intent of the language. The word "program" was also changed to "plan" in §299.15(a)(3)(A)(ii) to be consistent with §299.43(a).

Regarding §299.43(a), BRA suggested that the operation and maintenance plan should be submitted to the executive director for information purposes only.

The commission acknowledges the comment. However, the plan is not required to be submitted to the executive director. The owner should have the plan available when the dam is inspected. No changes were made in the rules in response to this comment.

Regarding §299.43(a)(2), activities to be included in a plan, LGRT indicated that the use of the word "original" before the words "professional engineer design" was unclear.

The commission agrees with the comment and has deleted the word "original" since other design criteria may also be necessary to include in the operation and maintenance plan.

Regarding §299.43(a)(3), FNI suggested adding the words "but not be limited to" to the list.

The commission agrees that there could be additional items in the operation and maintenance plan; therefore, the recommended language has been added.

Regarding §299.43(a)(3) and §299.43(a)(4), FNI suggested that the lists referred to in the rules should be in guidelines instead of rules.

The commission does not agree with the comment. The lists clearly identify the specific operation and maintenance items that must be included in a plan. No changes were made in the rules in response to this comment.

Regarding §299.44, Gate Operation Plan, LGRT indicated that the requirements should not be considered prescriptive, but should allow dam owners to address constantly changing conditions during varying hydrologic events.

The commission does not agree with the comment that the section is prescriptive. The rule gives enough flexibility for the owner to address operation during any event. However, the commission has added "other varying hydrologic events" to the items that must be included in the plan to give dam owners more flexibility.

Regarding §299.44, BRA suggested that the gate operation plan should be submitted to the executive director for information purposes only. TWCA suggested that in lieu of submitting the plan to the executive director, the plan be kept in a secure location and make those plans available to the executive director at the offices of the owner.

The commission acknowledges the comments. The rule does not require submission of the gate operation plan. If the owner decides to send the plan to the executive director, it will be placed with the emergency action plan as an appendix. No comments will be submitted to the owner. Therefore, the owner can maintain the plan at his office. No changes were made in the rules in response to this comment.

Regarding §299.44, LCRA, LP, and TWCA suggested that the two-year requirement for submission of a gate operation plan is not long enough. It was suggested that either an exception and extension of time, or a negotiated time be provided in the language.

The commission agrees with the comments. The two-year time frame may be too short for some owners; therefore, language has been added to §299.44(a) to allow the owner to request an extension of time and to provide the process of requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the emergency action plan.

Regarding §299.44(a), FNI suggested deleting the word "principal" between "gated" and "spillways" and changing "their" to "a."

Gates could be used on either principal or emergency spillways; therefore, the commission agrees with the first suggestion. The commission also agrees with the second suggestion since an owner may not have a professional engineer or has a professional engineer that is not familiar with gate operation procedures. The commission has made the recommended changes to the rule.

Regarding §299.44(a), LP indicated that the language requires a gate operation plan without regard for the size of the watershed and requests consideration of a provision that the requirement be waived for dams with small watersheds and gates only for lowering the lake.

The commission responds that all dams with gated spillways should have a gate operation plan regardless of the size of the watershed. A design flood can occur on any watershed and the owner would need to operate the gates using some type of procedure. That procedure, even if a simple procedure, should be developed in advance of a flood event. No changes were made in the rules in response to this comment.

Regarding §299.45(b), FNI suggested adding "or other appropriate means" after "electronic mail."

The commission agrees that the rules should not limit the type of notification that may be used in notifying the executive director about emergency situations. Therefore, the commission has added the word "facsimile" to the rule instead of the suggested language since the suggested language is a broad term that would be hard to define.

Regarding §299.51(c), LGRT suggested that the word "construction" be replaced with the word "work."

The commission agrees that this suggested word is a better word and has made the change to the rule.

Regarding §299.51(d), LGRT indicated that the language is not clear since the word "property" can have more than one meaning. LGRT recommended that the subsection should either be deleted or rewritten.

The commission agrees that the language is not clear. The language has been changed in the rule in response to the comment to indicate that the owner may be required to restore the dam site to blend with the topography of the lake area.

Regarding §299.52, FNI questions if removal of dams after abandonment applies to low-hazard dams.

The commission agrees that the language in the rule needs to be clarified. The section applies to all dams, and the rule has been revised for clarity to include all dams, regardless of hazard classification.

Regarding §299.61, TWCA, LP, FNI, LCRA, and LGRT suggested that the two-year requirement for submission of an emergency action plan is not long enough. It was suggested that either an exception and extension of time, or a negotiated time be provided in the language.

The commission agrees with the comments. The two-year time frame may be too short for some owners; therefore, the commission has revised §299.61(b) to allow the owner to request an extension of time. The commission has also revised §299.61(d) to provide the process of requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the emergency action plan.

Regarding §299.61, BRA and LGRT suggested that the emergency action plan should be submitted to the executive director for information purposes only. TWCA suggested that in lieu of submitting the plan to the executive director, the plan be kept in

a secure location and make those plans available to the executive director at the offices of the owner.

The commission responds that an emergency action plan is one of the most important documents associated with the dam and needs to be reviewed to determine if the plan includes all of the important parts of a plan. The executive director will provide comments within 30 days of receipt of the plan. The executive director needs a copy of the plan in the event of an emergency. No changes were made in the rules in response to this comment.

Regarding §299.61(d), CRMWD and TWCA suggested that the executive director publish a guideline for preparation of emergency action plans before the start of the two-year requirement.

The commission agrees with the comment. The guideline will be published before the rule is effective. No changes were made in the rules in response to this comment.

Regarding §299.61(h), FNI requested clarification of the term "table top exercise" and suggested that this needs to be referenced in the emergency action plan guideline in §299.61(d). COA expressed concern about performing table top exercises individually for the number of dams they own. COA requested that an alternative exercise be considered.

The commission responds that a "table top exercise" is a meeting of the dam owner and the state and local emergency management officials in a conference room environment. A table top exercise can be done at the same time for multiple dams if the dams are within the same jurisdiction, since the same emergency management personnel will be involved. The definition of a table top exercise is included in the rule for clarity. In addition, more guidance on table top exercises is included in the emergency action plan guidelines.

Regarding §299.62, BRA suggested that the security plan should be submitted to the executive director for information purposes only. TWCA suggested that in lieu of submitting the plan to the executive director, the plan be kept in a secure location and make those plans available to the executive director at the offices of the owner.

The commission responds that a security plan is a very important document for the owner and needs to be reviewed to determine if the plan includes all of the important parts of a plan. The executive director will provide comments within 30 days of receipt of the plan. The executive director needs a copy of the plan in the event of a threat. No changes were made in the rules in response to this comment.

Regarding §299.62, TWCA, LP, FNI, LCRA, and LGRT suggested that the two-year requirement for submission of a security plan is not long enough. It was suggested that either an exception and extension of time, or a negotiated time be provided in the language.

The commission agrees with the comments. The two-year time frame may be too short for some owners; therefore, language has been added to §299.62 (b) to allow the owner to request an extension of time and to provide the process of requesting an extension, including showing cause or a reasonable basis for the extension and the time frame for completing the security plan.

Regarding §299.62(a)(1), TWCA expressed concern that the language is too vague, since security is situational, differing from dam to dam. TWCA suggested that language be included to define types of threats to plan for and the level of security that will be required.

The commission agrees that security is situational and varies from dam to dam. Therefore, the language is general and not specific. The intent is that each dam owner develop a security plan that addresses the threats for that dam and how to secure the dam for those threats. No changes were made in the rules in response to this comment.

Regarding §299.71, LGRT asked about the protocol that will be used for initiating enforcement for violations of the rules, how the agency will distinguish between major and minor violations, and the type of violations that will trigger formal enforcement.

The commission responds that enforcement of violations is beyond the scope of this rulemaking and will be handled in development of the enforcement initiation criteria under a separate process after the rule is approved. No changes were made in the rules in response to this comment.

Regarding §299.72, FNI asked how the commission could direct an owner to take action without notice to the owner.

The commission responds that the language in this section is from Texas Water Code, §12.052(d) and (e), which allows the commission to take immediate action for an emergency without going through the notice process. However, the owner is provided notice after the emergency action and may request a hearing under Chapter 35 of the agency's rules.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§299.1 - 299.5

STATUTORY AUTHORITY

These repeals are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted repeals implement TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806465
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER B. DESIGN AND EVALUATION OF DAMS

30 TAC §§299.11 - 299.18

STATUTORY AUTHORITY

These repeals are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted repeals implement TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806467
Robert Martinez
Director
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER C. CONSTRUCTION REQUIREMENTS

30 TAC §§299.21 - 299.31

STATUTORY AUTHORITY

These repeals are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted repeals implement TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806469
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER D. REMOVAL OF DAMS

30 TAC §299.51

STATUTORY AUTHORITY

The repeal is adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

The adopted repeal implements TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806472
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER E. EMERGENCY ACTION

30 TAC §299.61

STATUTORY AUTHORITY

The repeal is adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair,

and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

The adopted repeal implements TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806474
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§299.1 - 299.7

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.1. Applicability.

(a) This chapter applies to design, review, and approval of construction plans and specifications; and construction, operation and maintenance, inspection, repair, removal, emergency management, site security, and enforcement of dams that:

(1) have a height greater than or equal to 25 feet and a maximum storage capacity greater than or equal to 15 acre-feet, as described in paragraph (2) of this subsection;

(2) have a height greater than six feet and a maximum storage capacity greater than or equal to 50 acre-feet;
Figure: 30 TAC §299.1(a)(2)

(3) are a high- or significant-hazard dam as defined in §299.14 of this title (relating to Hazard Classification Criteria), regardless of height or maximum storage capacity; or

(4) are used as a pumped storage or terminal storage facility.

(b) This chapter provides the requirements for dams, but does not relieve the owner from meeting the requirements in Texas Water Code (TWC), Chapter 11, and Chapters 213, 295, and 297 of this title (relating to Edwards Aquifer; Water Rights, Procedural; and Water Rights, Substantive; respectively). All applicable requirements in those chapters will still apply.

(c) This chapter does not apply to:

(1) dams designed by, constructed under the supervision of, and owned and maintained by federal agencies such as the Corps of Engineers, International Boundary and Water Commission, and the Bureau of Reclamation;

(2) embankments constructed for roads, highways, and railroads, including low-water crossings, that may temporarily impound floodwater, unless designed to also function as a detention dam;

(3) dikes or levees designed to prevent inundation by floodwater;

(4) off-channel impoundments authorized by the commission under TWC, Chapter 26; and

(5) above-ground water storage tanks (steel, concrete, or plastic).

(d) All dams must meet the requirements in this chapter, including dams that do not require a water right permit, other dams that are exempt from the requirements in Subchapter C of this chapter (relating to Construction Requirements), and dams that are granted an exception as defined in §299.5 of this title (relating to Exception).

§299.2. Definitions.

The following words and terms in this section are in addition to the definitions in §3.2 of this title (relating to Definitions). The words and terms in this section, when used in this chapter, have the following meanings.

(1) Abandon--The owner no longer maintaining a dam for a period of ten years, or refusing to maintain the dam.

(2) Accepted engineering practices--The application of design and analysis methods that are commonly used by professional engineers in their field of expertise and are well documented in published design manuals, codes of practice, text books, and engineering journals.

(3) Alteration--Any change to a dam or appurtenant structures that affects the integrity, safety, and operation of the dam, including, but not limited to:

(A) changing the height of a dam;

(B) increasing the normal pool or principal spillway elevation, or changing the hydraulic capability of the principal spillway; or

(C) changing the original elevation, physical dimensions, or hydraulic capability of an emergency spillway.

(4) Appurtenant structures--The outlet works and controls, spillways and controls, gates, valves, siphons, access structures, bridges, berms, drains, hydroelectric facilities, instrumentation, and other structures related to the operation of a dam.

(5) Breach--An excavation or opening, either controlled or a result of a failure of the dam, through a dam or spillway that is capable of completely draining the reservoir down to the approximate original topography so the dam will no longer impound water, or partially draining the reservoir to lower impounding capacity.

(6) Breach analysis--The analysis of potential dam failure scenarios, including overtopping and piping (magnitude, duration, and location), using accepted engineering practices, to evaluate downstream hazard potential or to develop inundation maps.

(7) Breach inundation area--An area that would be flooded as a result of a dam failure.

(8) Closure of dam--The commencement of placing material within the closure section of the dam.

(9) Closure section--The section of the dam left open during construction of a proposed dam in order to pass floodwaters through the dam without endangering the dam.

(10) Commence construction--An actual, visible activity beyond planning or land acquisition that initiates the beginning of the construction of a dam in the manner specified in the approved construction plans and specifications for that dam. The action must be performed in good faith with the intent to continue with the construction through completion.

(11) Conceptual design--A design that presents a location and proposed plan of the dam and appurtenant structures and elevations of all pertinent features of the dam.

(12) Construction--Building a proposed dam and appurtenant structures capable of storing water.

(13) Construction change order--A document recommended by the owner's professional engineer and signed by the owner's contractor and the owner that authorizes a significant addition, deletion, or revision of the approved construction plans and specifications that has a material impact on the safety and integrity of the dam.

(14) Dam--Any barrier or barriers, with any appurtenant structures, constructed for the purpose of either permanently or temporarily impounding water.

(15) Dam failure--breach and uncontrolled release of the reservoir.

(16) Deficient dam--A dam that fails to meet the requirements of this chapter and poses a significant threat to human life or property.

(17) Deliberate impoundment--The intentional impoundment of water in the reservoir, including:

(A) closing the lowest planned outlet or spillway;

(B) blocking the diversion works that are used during construction to divert water around the construction area; and

(C) beginning the closure of the dam.

(18) Design flood--The flood used in the design and evaluation of a dam and appurtenant structures, particularly for determining the size of spillways, outlet works, and the effective crest of the dam.

(19) Detention dam--A dam that has an impoundment that is normally dry and has an ungated outlet structure that is designed to completely drain the water impounded during a flood within five days.

(20) Drawdown--The change in surface elevation of a reservoir due to a withdrawal of water from the reservoir.

(21) Effective crest of the dam--The elevation of the lowest point on the crest (top) of the dam, excluding spillways.

(22) Emergency action plan--A written document prepared by the owner or the owner's professional engineer describing a detailed plan to prevent or lessen the effects of a failure of the dam or appurtenant structures.

(23) Emergency repairs--Any repairs, considered to be temporary in nature, necessary to preserve the integrity of the dam and prevent a possible failure of the dam.

(24) Emergency spillway--An auxiliary spillway designed to pass a large, but infrequent, volume of flood flow, with a crest elevation higher than the principal spillway or normal operating level.

(25) Engineering inspection--Inspection performed by a professional engineer, or under the supervision of a professional engineer, to evaluate the condition, safety, and integrity of the dam and appurtenant structures to determine if the dam and appurtenant structures meet applicable rules and accepted engineering practices, including a field inspection and review of records for design, construction, and performance.

(26) Enlargement--Any change in, or addition to, an existing dam or reservoir that raises, or may raise, the normal storage capacity of the reservoir impounded by the dam.

(27) Existing dam--Any dam under construction or completed as of the effective date of these rules.

(28) Fetch--The straight-line distance across a reservoir subject to wind forces.

(29) Hazard classification--A measure of the potential for loss of life, property damage, or economic impact in the area downstream of the dam in the event of a failure or malfunction of the dam or appurtenant structures. The hazard classification does not represent the physical condition of the dam.

(30) Height of dam--The difference in elevation between the natural bed of the watercourse or the lowest point on the downstream toe of the dam, whichever is lower, and the effective crest of the dam.

(31) Inundation map--A map delineating the area that would be flooded by a particular flood event, or a dam failure.

(32) Loss of life--Human fatalities that would result from a failure of the dam, without considering the mitigation of loss of life that could occur with evacuation or other emergency actions.

(33) Main highways--Roads classified as a rural arterial system by the Texas Department of Transportation, including interstate highways, United States highways, and state highways.

(34) Maintenance--Those tasks that are generally recurring and are necessary to keep the dam and appurtenant structures in a sound condition, free from defect or damage that could hinder the dam's functions as designed, including adjacent areas that also could affect the function and operation of the dam.

(35) Maintenance inspection--Visual inspection of the dam and appurtenant structures by the owner or owner's representative to detect apparent signs of deterioration, other deficiencies, or any other areas of concern.

(36) Maximum storage capacity--The volume, in acre-feet, of the impoundment created by the dam at the effective crest of the dam. For purposes of calculating maximum storage capacity for the Inventory of Dams as described in §299.7 of this title (relating to Inventory of Dams), only water that can be stored above natural ground level (not in excavations in the reservoir) or that could be released by a failure of the dam is considered in assessing the storage volume. The maximum storage capacity may decrease over time due to sedimentation or increase if the reservoir is dredged.

(37) Minimum freeboard--The difference in elevation between the effective crest of the dam and the maximum water surface elevation resulting from routing the design flood appropriate for the dam.

(38) Minor highways--Roads classified as a rural collector road or rural local road by the Texas Department of Transportation, including county roads and Farm-to-Market roads not used to provide service to schools.

(39) Modification--Any structural alteration of a dam, the spillways, the outlet works, or other appurtenant structures that could influence or affect the integrity, safety, and operation of the dam.

(40) Normal storage capacity--The volume, in acre-feet, of the impoundment created by the dam at the lowest uncontrolled spillway crest elevation, or at the maximum elevation of the reservoir at the normal (non-flooding) operating level.

(41) NAD83 conus datum--The North American Datum of 1983 is a reference system used to obtain the spherical coordinates of a point on the earth's surface. The standard North American Datum of 1983, or any future updates, must be used for all latitude and longitude measurements.

(42) NAVD88 datum--The North American Vertical Datum of 1988 is a reference system used to obtain vertical measurements on the earth's surface. The North American Vertical Datum of 1988 must be used for all vertical measurements recorded with a global positioning system receiver.

(43) Outlet--A conduit or pipe controlled by a gate or valve, or a siphon, that is used to release impounded water from the reservoir.

(44) Owner--Any person who can be one or more of the following:

(A) holds legal possession or ownership of an interest in a dam;

(B) is the fee simple owner of the surface estate of the tract of land on which the dam is located if actual ownership of the dam is uncertain, unknown, or in dispute unless the person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the dam is owned by another person or persons;

(C) is a sponsoring local organization that has an agreement with the Natural Resources Conservation Service for a dam constructed under the authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act, 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program; or

(D) has a lease, easement, or right-of-way to construct, operate, or maintain a dam.

(45) Piping--The progressive removal of soil particles from a dam by percolating water, leading to development of channels or flow paths.

(46) Principal spillway--The primary or initial spillway engaged during a rainfall runoff event that is designed to pass normal flows.

(47) Probable maximum flood (PMF)--The flood magnitude that may be expected from the most critical combination of meteorologic and hydrologic conditions that are reasonably possible for a given watershed.

(48) Probable maximum precipitation (PMP)--The theoretically greatest depth of precipitation for a given duration that is physically possible over a given size storm area at a particular geographical location at a certain time of the year.

(49) Professional engineer--An individual licensed by the Texas Board of Professional Engineers to engage in the practice of engineering in the state of Texas, with experience in the investigation, design, construction, repair, and maintenance of dams.

(50) Proposed dam--Any dam not yet under construction.

(51) Pumped storage dam--A rectangular or circular embankment used to store water pumped from another source.

(52) Reconstruction--Removal and replacement of an existing dam or appurtenant structures.

(53) Rehabilitation--The completion of all work necessary to extend the service life of a dam and meet the safety and performance standards of this chapter.

(54) Removal--The complete elimination of a dam, the appurtenant structures, and the reservoir to the extent that no water can be impounded by the dam or reservoir and the approximate original topography of the dam and reservoir area is restored.

(55) Repairs--Any work done on a dam that may affect the integrity, safety, and operation of the dam, including, but not limited to:

(A) excavation into the embankment fill or foundation of a dam; or

(B) removal or replacement of major structural components of a dam or appurtenant structures.

(56) Reservoir--A body of water impounded by a dam.

(57) Safe manner--Operating and maintaining a dam in sound condition, free from defect or damage that could hinder the dam's functions as designed.

(58) Seal--To affix a professional engineer's seal to each sheet of construction plans or to an engineering report or required document.

(59) Secondary highways--Roads classified as a rural major collector road by the Texas Department of Transportation, including Farm-to-Market roads used to provide service to schools.

(60) Secure location--A building that is locked and accessible to the owner and owner's representative.

(61) Spillway--An appurtenant structure that conducts outflow from a reservoir.

(62) Sponsoring local organization--any political subdivision of the state, or other entity, with the authority to carry out, maintain, or operate work of improvement installed with the assistance of the federal government.

(63) Stability analysis--The analytical procedure for determining the most critical factor of safety for a slope.

(64) Substantially complete--A dam under construction that is complete except for minor correction of items identified in the final construction inspection and that can be operated in a safe manner to the dam's full functional capability.

§299.6. Changing Ownership of Dams.

When there is a change in ownership of the property that includes a dam, the current owner shall include notification to the new owner in the transaction that the new owner shall notify the executive director in writing within 90 days following the transaction and provide:

(1) the name, address, and telephone number of the new owner(s);

(2) the date of ownership transfer;

(3) the name and telephone number of the individual who will be responsible for operation and maintenance of the dam; and

(4) a certified copy or photocopy of instruments recorded in the office of the county clerk showing transfer of the dam and property on which the dam is located to a new owner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806466
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER B. DESIGN AND EVALUATION OF DAMS

30 TAC §§299.11 - 299.17

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.13. Size Classification Criteria.
The executive director shall classify dams for size based on the larger of the height of the dam or the maximum storage capacity.
Figure: 30 TAC §299.13

§299.14. Hazard Classification Criteria.
The executive director shall classify dams for hazard based on either potential loss of human life or property damage, in the event of failure or malfunction of the dam or appurtenant structures, within affected developments, that are existing at the time of the classification. The hazard classification may include use of a breach analysis that addresses the incremental impact of the potential breach over and above the impact of the flood that may have caused the breach, as defined in §299.15(a)(4)(A)(i) of this title (relating to Hydrologic and Hydraulic Criteria for Dams). The classification must be according to the following.

(1) Low. A dam in the low-hazard potential category has:

(A) no loss of human life expected (no permanent habitable structures in the breach inundation area downstream of the dam); and

(B) minimal economic loss (located primarily in rural areas where failure may damage occasional farm buildings, limited agricultural improvements, and minor highways as defined in §299.2(38) of this title (relating to Definitions)).

(2) Significant. A dam in the significant-hazard potential category has:

(A) loss of human life possible (one to six lives or one or two habitable structures in the breach inundation area downstream of the dam); or

(B) appreciable economic loss, located primarily in rural areas where failure may cause:

(i) damage to isolated homes;

(ii) damage to secondary highways as defined in §299.2(58);

(iii) damage to minor railroads; or

(iv) interruption of service or use of public utilities, including the design purpose of the utility.

(3) High. A dam in the high-hazard potential category has:

(A) loss of life expected (seven or more lives or three or more habitable structures in the breach inundation area downstream of the dam); or

(B) excessive economic loss, located primarily in or near urban areas where failure would be expected to cause extensive damage to:

(i) public facilities;

(ii) agricultural, industrial, or commercial facilities;

(iii) public utilities, including the design purpose of the utility;

(iv) main highways as defined in §299.2(33); or

(v) railroads used as a major transportation system.

§299.15. Hydrologic and Hydraulic Criteria for Dams.

(a) Hydrologic criteria.

(1) Minimum hydrologic criteria for proposed dams. The following minimum hydrologic criteria includes those proposed dams to be constructed according to Texas Water Code, §11.142.

(A) A proposed dam design must meet the minimum design flood hydrograph criteria.
Figure: 30 TAC §299.15(a)(1)(A)

(B) The minimum design flood hydrograph must be based on the size and hazard classification of a proposed dam at the time of the design and calculated using the criteria in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

(C) Proposed dams and spillways or dams and spillway to be reconstructed, modified, enlarged, rehabilitated, or altered using hydrologic procedures of the Natural Resources Conservation Service will be acceptable, provided that the procedures are shown to be equal to or more conservative than the procedures provided in the most cur-

rent version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*.

(2) Exemptions to minimum hydrologic criteria for proposed dams. Any dam designed to withstand overtopping without failure of the dam, including the foundation and abutments, as demonstrated by studies prepared by the owner's professional engineer will be exempt from the minimum hydrologic criteria.

(3) Minimum hydrologic criteria for existing dams. The following criteria applies to dams that existed before the effective date of this subchapter.

(A) An owner of a large- or high-hazard existing dam that was required to meet 100% of the probable maximum flood (PMF) before the effective date of these rules and that is shown by an evaluation by a professional engineer to meet 75% or more of the PMF will not be required to upgrade the dam to meet minimum hydrologic criteria in paragraph (1)(A) of this subsection. The dam will be considered adequate to meet the minimum hydrologic criteria, provided the owner:

(i) has an emergency action plan that meets the requirements in §299.61 of this title (relating to Emergency Action Plans);

(ii) has an operation and maintenance plan for the dam as described in §299.43 of this title (relating to Operation and Maintenance);

(iii) has an inspection program that has been implemented as described in §299.42 of this title (relating to Inspections); and

(iv) submits an annual report to the executive director documenting compliance with the requirements in clauses (ii) and (iii) of this subparagraph, beginning 12 months after the effective date of this section.

(B) An owner of a dam not specified in paragraph (3)(A) of this subsection that was required to meet the minimum hydrologic criteria before the effective date of these rules, but is shown by an evaluation by a professional engineer to meet the minimum hydrologic criteria in paragraph (1)(A) of this subsection, will not be required to be upgraded and the dam will be considered adequate to meet the minimum hydrologic criteria.

(C) An owner of an existing dam that does not meet the minimum hydrologic criteria in paragraph (1)(A) of this subsection or the size or hazard classification has been raised and the dam does not meet the minimum hydrologic criteria in paragraph (1)(A) of this subsection for the new size or hazard classification may be required to submit to the executive director any of the following, prepared by a professional engineer:

(i) final construction plans and specifications as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications) for modifying, enlarging, or altering the dam or spillways to meet the minimum hydrologic criteria as described in paragraph (1)(A) of this subsection, provided the minimum hydrologic criteria at least meets 75% of the PMF and the owner addresses the requirements in paragraph (3)(A) of this subsection;

(ii) an analysis or other option to request a reduction in the minimum hydrologic criteria as described in paragraph (4) of this subsection; or

(iii) a plan for alternatives to upgrading as described in §299.17 of this title (relating to Alternatives to Upgrading Dams).

(D) An owner of an existing dam that meets the requirements of subparagraph (A) of this paragraph and that is required to be modified due to structural deficiencies shall be required to submit to the executive director final construction plans and specifications for the structural modifications as described in §299.22 of this title. The dam will not be required to be upgraded to meet the minimum design criteria in paragraph (1)(A) of this subsection.

(E) An owner of a dam that has been evaluated under this paragraph shall be advised of the requirements for the owner's dam by letter. The owner shall be required to submit a written plan of action to address the requirements and a time frame to complete the requirements.

(4) Reduction of minimum hydrologic criteria. The minimum hydrologic criteria may be reduced as follows.

(A) The owner may request that the executive director reduce the minimum hydrologic criteria if the owner submits:

(i) dam breach analysis, prepared by a professional engineer and using the normal storage capacity non-flood event, the barely overtopping flood event, and the design flood event, if applicable, that demonstrate existing downstream improvements would not be adversely affected, which is defined as the downstream flooding differentials being less than or equal to one foot between breach and non-breach simulations in the affected area;

(ii) one or more technical options included in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*, demonstrating that existing downstream improvements would not be adversely affected;

(iii) documentation of the purchase, or an easement for, the property downstream of the dam that would be impacted by a dam failure and showing that it has been dedicated to non-residential and non-commercial use; or

(iv) documentation that the property downstream has been dedicated by the property owner to non-residential and non-commercial use.

(B) The executive director shall evaluate the owner's request for reduction in the minimum hydrologic criteria to determine if the request is appropriate. If the executive director agrees with the analysis, the executive director shall approve the request in writing.

(C) If the executive director does not agree with the owner's request for reduction in the minimum hydrologic criteria, the executive director shall deny the request in writing.

(b) Hydraulic criteria for proposed dams or dams proposed to be reconstructed, modified, enlarged, rehabilitated, or altered.

(1) The owner shall have a professional engineer evaluate the hydraulic adequacy of the dam and spillways using the guidelines in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

(2) The owner shall have a professional engineer address the stability of the spillways to determine if the spillways will adequately meet the minimum design storm without being significantly damaged.

(3) The owner shall have a professional engineer determine a minimum freeboard for a proposed large size dam as defined in §299.13 of this title (relating to Size Classification Criteria) as outlined in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas*.

(c) Hydraulic criteria for existing dams. If it becomes necessary for an owner of an existing dam to reevaluate the hydraulic adequacy of the dam and spillways, the owner shall have a professional en-

gineer evaluate the hydraulic adequacy of the dam and spillways using the guidelines in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines of Dams in Texas*.

§299.16. Structural Evaluation of Dams.

(a) The owner shall have a professional engineer submit a geotechnical, geological, and structural evaluation in a report to the executive director with the final construction plans and specifications as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications) to support the design of a proposed dam or a dam that is proposed to be reconstructed, or structurally modified, enlarged, rehabilitated, or altered. The report must include, as applicable:

(1) details of the geology of the project site and vicinity;

(2) location and logs of test borings, pits, and shafts;

(3) results of field and laboratory tests on structural and foundation materials;

(4) seepage studies;

(5) stability analyses of embankments, spillways, retaining walls, and inlet structures, as described in subsection (b) of this section; and

(6) recommendations concerning:

(A) embankment slopes, crest width, and berms;

(B) core trench size and depths;

(C) moisture-density and strength requirements;

(D) soil dispersion requirements;

(E) minimum compressive strength for concrete;

(F) construction sequence procedures and techniques for excavations and embankments;

(G) types of compaction equipment; and

(H) seepage control requirements.

(b) The owner shall have a professional engineer develop a stability analysis as outlined in the most current version, at the time of the analysis, of the agency's *Design and Construction Guidelines for Dams in Texas* to support the design of proposed large- and intermediate-size dams, as defined in §299.13 of this title (relating to Size Classification Criteria), and large- and intermediate-size dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered. The analysis must be submitted to the executive director with the final construction plans and specifications as described in §299.22 of this title.

(c) The executive director may require the owner of an existing dam to have a professional engineer perform a geotechnical and structural evaluation or a stability analysis and submit a report, as described in subsections (a) and (b) of this section, following an inspection, as described in §299.42 of this title (relating to Inspections), if the executive director determines that the dam was found to be deficient and the integrity of the dam was threatened. If the owner has a professional engineer prepare a report, the owner shall submit the professional engineer's report to the executive director for review upon completion of the report.

(d) When a person proposes one of the following activities near the owner's dam, the owner or the executive director may request that the person have a professional engineer perform an evaluation to determine if the integrity of the dam would be compromised. If the person has a report prepared by a professional engineer, the person shall submit the evaluation report to the executive director and the owner for review and approval before any work is performed for a proposal to:

(1) dredge the reservoir within 200 feet of the dam;

(2) install a utility line or pipeline in the dam or in the spillways that requires significant excavation in the dam or spillways;

(3) construct a road across the dam or spillways or within 200 feet of the dam;

(4) drill oil or gas wells, perform horizontal drilling or fracturing, or perform oil or gas exploration within 500 feet of the dam and spillways; or

(5) blast within 1/2 mile of the dam.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806468
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER C. CONSTRUCTION REQUIREMENTS

30 TAC §§299.21 - 299.33

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.21. Applicability.

(a) This subchapter applies only to construction requirements, including submittal, review, and approval of engineering plans and specifications, inspections, reports, and records, for the construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam:

(1) requiring a water rights permit authorization;

(2) requiring an Edwards Aquifer protection plan;

(3) originally designed and constructed with the assistance and written concurrence of the Natural Resources Conservation Service

under authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act of 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program, but being proposed to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired without the assistance and written concurrence of the Natural Resources Conservation Service;

(4) used for a pumped storage facility;

(5) used for temporary detention purposes and impounding a maximum storage capacity of 200 acre-feet or more; or

(6) that is small and classified as either significant- or high-hazard, as defined in §299.13 and §299.14 of this title (relating to Size Classification Criteria; and Hazard Classification Criteria; respectively), and exempt from a water rights permit under Texas Water Code, §11.142.

(b) This subchapter does not apply to:

(1) dams for which an exception is approved according to §299.5 of this title (relating to Exception) to the extent for which the exemption is granted;

(2) proposed dams designed and constructed, or existing dams designed and modified, rehabilitated, or repaired, with the assistance and written concurrence of the Natural Resources Conservation Service under authorization of the Flood Control Act of 1944 (as amended), Public Law 78-534, the Watershed Protection and Flood Prevention Act of 1954 (as amended), Public Law 83-566, the pilot watershed program under the Flood Prevention of the Department of Agriculture Appropriation Act of 1954, Public Law 156-67, or Subtitle H of Title XV of the Agriculture and Flood Act of 1981, the Resource Conservation and Development Program;

(3) proposed dams designed and constructed, or existing dams designed and modified, rehabilitated, or repaired for mining purposes and approved and inspected by the Mine Safety and Health Administration;

(4) small, low-hazard dams, as defined in §299.13 and §299.14 of this title, exempted from a water rights permit under Texas Water Code, §11.142; and

(5) maintenance or emergency repairs, as defined in §299.2 of this title (relating to Definitions).

§299.22. Review and Approval of Construction Plans and Specifications.

(a) General.

(1) The owner shall submit final construction plans and specifications, which are sealed, signed, and dated by a professional engineer, to the executive director for review and approval before commencing construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam. Emergency repairs are defined in §299.2(23) of this title (relating to Definitions) and §299.45 of this title (relating to Emergency Repairs).

(2) The executive director shall not issue approval of final construction plans and specifications for construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam until a water rights permit or an Edwards Aquifer protection plan, if required, is issued.

(3) The executive director shall not issue approval of final construction plans and specifications for construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam unless the plans and specifications include language, or design criteria, that requires the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a Notice of Intent (NOI) for coverage under the State of Texas Construction General Permit (TXR150000), if applicable.

(4) The owner shall not allow construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be commenced before the executive director's review of the final construction plans, specifications, and other engineering reports and the owner receives written approval of the final construction plans and specifications. The owner shall provide a copy of the executive director's written approval to the contractor before commencing construction.

(5) Construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam shall be performed according to the final construction plans and specifications approved by the executive director unless construction change orders have been approved as indicated in §299.26 of this title (relating to Construction Change Orders).

(b) Construction plans.

(1) Construction plans for proposed dams must be 22 inches by 34 inches in size. The plans may be reduced to 11 inches by 17 inches in size if all details are clearly legible and an accurate scale is included. A scale must be included on all sheets of the construction plans. The plans must include the following, as applicable:

(A) a vicinity map that shows the location of the proposed dam and appurtenant structures with respect to:

(i) boundaries of political subdivisions;

(ii) streams;

(iii) highways;

(iv) railroads;

(v) pipelines;

(vi) transmission lines; and

(vii) utilities;

(B) a topographic map of the dam site with:

(i) contour intervals not to exceed five feet;

(ii) latitude and longitude (in decimal degrees to six decimal places) of the midpoint of the dam using the North American Vertical Datum of 1988 conus datum; and

(iii) a superimposed plan of the dam showing the locations of any:

(I) spillways;

(II) outlet conduit;

(III) borings and test pits;

(IV) possible borrow areas; and

(V) other structures.

(C) a profile of the dam site taken on the long axis of the dam showing:

(i) the location of the outlet conduit and each spillway;

(ii) the proposed bottom of the core trench; and

(iii) elevations of all features.

(D) a profile of each spillway along its long axis;

(E) a log of all borings showing the classification of materials encountered below the surface, if not provided in a separate geotechnical report;

(F) a cross section of the dam at maximum section showing complete details and dimensions;

(G) detailed sections of outlet conduits, control works, and spillways with a sufficient number and detail to delineate all of these features;

(H) the proposed location of all permanent instrumentation, pressure cells, settlement plates, piezometers, inclinometers, slope indicator casings, data acquisition systems, or other devices;

(I) the requirements, or design criteria, for the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a NOI, if applicable, or authorization under TXR150000; and

(J) other design standards as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas.*

(2) Construction plans for the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of existing dams must be 22 inches by 34 inches in size. The plans may be reduced to 11 inches by 17 inches in size if all details are clearly legible and an accurate scale is included. A scale must be included on all sheets of the construction plans. The plans must include the following, as applicable:

(A) a vicinity map that shows the location of the dam and spillways with respect to:

(i) boundaries of political subdivisions;

(ii) streams;

(iii) highways;

(iv) railroads;

(v) pipelines;

(vi) transmission lines; and

(vii) utilities.

(B) detailed sections of the dam, spillways, outlet conduit, or control works being enlarged, altered, or repaired with sufficient detail to delineate the work to be performed;

(C) a log of all borings, if necessary, showing the classification of materials encountered below the surface, if not provided in a separate geotechnical report;

(D) the requirements, or design criteria, for the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a NOI, if applicable or authorization under TXR150000; and

(E) other design criteria as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas.*

(c) Specifications. The specifications must include the following:

(1) the requirements for the various types of materials to be used in the construction or reconstruction, modification, enlargement, rehabilitation, alteration, or repair of the dam, spillways, outlet conduits, and control works;

(2) a provision that plans and specifications will not be substantially changed without either written approval of the executive director before the work is started, or notification of the changes as defined in §299.26 of this title;

(3) a requirement that the proposed contractor develop and implement a Storm Water Pollution Prevention Plan, if applicable, and submit an NOI for authorization under TXR150000; and

(4) other design specifications as described in the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas.*

(d) Engineering reports and plans.

(1) Engineering reports that may be required by the executive director for review include:

(A) a geotechnical, geological, and structural evaluation report that includes the information described in §299.16 of this title (relating to Structural Evaluation of Dams);

(B) a stability analysis for proposed large- and intermediate-size dams as defined in §299.13 of this title (relating to Size Classification Criteria), and large- and intermediate-size dams that are proposed to be reconstructed or structurally modified, enlarged, rehabilitated, or altered, as described in §299.16 of this title;

(C) a hydrologic and hydraulic report for proposed dams and dams that are to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired, that includes the information described in the most current version, at the time of the analysis, of the agency's *Hydrologic and Hydraulic Guidelines for Dams in Texas;*

(D) a report on proposed instrumentation for proposed large dams and existing large dams, as defined in §299.13 of this title, that are to be reconstructed, modified, enlarged, rehabilitated, altered, or repaired. This report must include:

(i) types and locations of proposed instrumentation;

(ii) depths of instrumentation; and

(iii) frequency and duration of data collection.

(E) any reports prepared for addressing site-specific conditions and recommendations.

(2) Engineering plans that may be required by the executive director for review include:

(A) a quality control and assurance plan for all proposed dams. This plan must include:

(i) designation and qualifications of the on-site inspector(s);

(ii) designation of a testing laboratory;

(iii) types and frequency of tests to be conducted; and

(iv) a construction schedule.

(B) a plan for closure of any proposed dam that requires a closure section. This plan must include:

(i) the percentage of construction work that will be completed or the amount of construction that would be completed before closure would start;

(ii) the sequence to be followed during closure; and

(iii) the estimated time to complete closure.

(C) a plan for addressing possible emergencies that threaten the integrity of the dam for all proposed high- and significant-hazard dams during construction. This plan must include:

(i) a flow chart for notification of emergency management officials and the downstream public;

(ii) identification of possible emergencies that could occur during construction and potential consequences;

(iii) technical requirements for addressing any possible emergencies; and

(iv) responsibilities of all parties.

(e) Review and approval process.

(1) The executive director shall review the final construction plans, specifications, and engineering reports and plans according to the most current version, at the time of the design, of the agency's *Design and Construction Guidelines for Dams in Texas.*

(2) If the final construction plans and specifications meet the requirements of this chapter and accepted engineering practices, the executive director shall issue written approval to the owner unless the plans and specifications are for a proposed dam and have been submitted as part of the application for a water rights permit or for an Edwards Aquifer protection plan.

(A) If the final construction plans and specifications are for a proposed dam and have been submitted as part of the application for a water rights permit, the executive director shall advise the owner that the plans and specifications meet the requirements of this chapter and accepted engineering practices. However, the executive director shall not issue written approval of the final construction plans and specifications until the water rights permit is issued and a time limitation section, in compliance with Texas Water Code, Chapter 11, has been added to the water rights permit requiring construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam to be started and completed within specified time frames.

(B) If the final construction plans and specifications are for a proposed dam and have been submitted as part of the application for an Edwards Aquifer protection plan, the executive director shall not issue written approval of the final construction plans and specifications until the Edwards Aquifer protection plan is issued by the appropriate regional office.

(3) If the final construction plans and specifications do not meet the requirements of this chapter, the executive director shall provide the owner written comments on the items needing revision.

(4) After receipt of the revised final construction plans and specifications or an addendum to the plans and specifications, the executive director shall review and issue written approval to the owner if all requirements in this chapter and accepted engineering practices have been met.

(5) If all requirements still have not been met, the executive director shall either provide the owner written comments on the items still needing revision or schedule a meeting with the owner to discuss the items needing revision.

(6) Upon submission of the revised, and agreed on, final construction plans and specifications or an addendum to the plans and specifications, the executive director shall issue written approval to the owner if applicable rules and accepted engineering practices have been met.

(f) Time limitations after approval of final construction plans and specifications.

(1) If construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam is not commenced within four years of the executive director's approval of final construction plans and specifications, the approval will be subject to reevaluation. If rules, regulations, and accepted engineering practices or the downstream hazard classification have changed during the four-year period, the approval may be considered invalid regardless of any extension of time authorizations given according to Chapter 295 of this title (relating to Water Rights, Procedural) and Chapter 297 of this title (relating to Water Rights, Substantive).

(2) If the executive director determines that the approval is invalid, the executive director shall notify the owner in writing that new construction plans, specifications, and other engineering reports must be submitted before the work may commence.

(3) The new construction plans and specifications must meet the requirements of the rules and regulations in effect at the time of the reevaluation.

§299.23. Maintenance of Construction Records.

(a) The owner shall maintain construction records during construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam, which include:

(1) approved construction plans and specifications;

(2) approved construction change orders;

(3) construction test results as described in subsection (b) of this section;

(4) approval letters; and

(5) construction inspection reports and other engineering reports that may be developed during construction.

(b) The owner shall furnish copies of the construction test results for high- and significant-hazard dams to the executive director for review at least once a month during the construction period to document compliance with the approved plans and specifications and the requirements in this chapter. The test results to be submitted must include, as applicable:

(1) soil moisture-density test results;

(2) soil dispersion test results; and

(3) concrete trial batch design test and compression test results.

(c) The owner shall also record, as applicable:

(1) final bottom width and elevations of core and cutoff trenches;

(2) structural excavations;

(3) documentation of permanent sheet piles or bearing piles; and

(4) documentation of foundation grouting, de-watering problems, or observations during the construction period of any instruments installed to measure movements, stresses, and pore pressure.

(d) The owner shall maintain the construction records as described in subsections (a) - (c) of this section in a secure location at the construction site or at a location designated by the owner that is immediately accessible to the owner until the completion of construction.

(e) After completion of construction, the owner shall transfer the construction records in subsections (a) - (c) of this section to a permanent, secure location designated by the owner that is immediately accessible to the owner as described in §299.46 of this title (relating to Records).

§299.24. Construction Progress Reports.

(a) The owner shall have a professional engineer provide the following information to the executive director in writing within ten working days after construction on the dam commences:

(1) the actual start date;

(2) the contractor's name and address; and

(3) the name and telephone number of the professional engineer or inspector that will be on site during construction.

(b) The owner shall have a professional engineer submit monthly reports of progress on high- and significant-hazard dams to the executive director during construction. The report must include:

(1) the work accomplished during the month;

(2) the percent of the contract time used;

(3) the percentage of completion of the project on the date of the report;

(4) a description of problem areas encountered during construction;

(5) the dates of the reporting period; and

(6) any changes in the contact information.

§299.27. Closure of Dam.

(a) The owner shall have a professional engineer submit a written request to close the dam to the executive director for approval as described in the most current version, at the time of the closure, of the agency's *Design and Construction Guidelines for Dams in Texas* before beginning closure of the dam. The request must include:

(1) a copy of the owner's emergency action plan; and

(2) documentation that all parts of the proposed plan for closure of the dam, as described in §299.22(d)(2)(B) of this title (relating to Review and Approval of Construction Plans and Specifications), have been met.

(b) The owner may begin closure of the dam after receiving written approval from the executive director.

(c) If appropriate, the owner shall notify the executive director in writing that the gate operation plan has been completed with the request for closure of the dam as described in §299.32 of this title (relating to Gate Operation Plan).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806470
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER D. OPERATION AND MAINTENANCE OF DAMS

30 TAC §§299.41 - 299.46

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.42. Inspections.

(a) Periodic engineering inspections by the executive director.

(1) The executive director may enter any person's property at any time for the purpose of inspecting any dam to determine if the dam is being maintained in a safe manner.

(2) The executive director shall perform periodic engineering inspections of dams based on hazard classification, as defined in §299.14 of this title (relating to Hazard Classification Criteria), on the following frequency.

(A) High-hazard dams shall be inspected once every five years.

(B) Significant-hazard dams shall be inspected once every five years.

(C) Large dams, as defined in §299.13 of this title (relating to Size Classification Criteria), in the low-hazard classification shall be inspected once every five years.

(D) Small and intermediate dams, as defined in §299.13 of this title, in the low-hazard classification shall not be included in the periodic inspection program. These dams may be inspected for the purposes of:

(i) determining hazard classification;

(ii) assessing condition of the dam following an emergency such as a flooding event;

(iii) assessing condition of the dam that could threaten the integrity of the dam as a result of a request by the owner;

(iv) assessing the condition of the dam as a result of a complaint; or

(v) assessing the condition of a dam as a result of a request from someone other than the owner.

(3) The executive director's engineering inspection may consist of:

(A) conducting a visual inspection and evaluation of the condition of the dam and appurtenant structures, the downstream area, and any other areas affected by the dam;

(B) taking measurements of elevations, dimensions, slopes, and locations of the dam and appurtenant structures;

(C) taking photographs for documentation;

(D) conducting an evaluation of the hazard classification to determine if the classification should be changed as a result of the inspection;

(E) reviewing and evaluating the owner's operation, maintenance, and inspection programs and all other records; and

(F) reviewing the owner's emergency action plan, including the gate operation plan if applicable.

(4) The executive director shall prepare a written inspection report that provides the findings from the inspection and lists recommendations for actions to be taken to assist the owner in maintaining the continued integrity, safety, and operation of the dam. The executive director may require the owner to have the owner's professional engineer perform hydrologic, hydraulic, or structural evaluations of the dam as described in Subchapter B of this chapter (relating to Design and Evaluation of Dams). The executive director shall provide the owner with a copy of the written report, or letter, as soon as practical after the inspection.

(5) The owner shall provide a written response to the executive director, if requested, and include a plan of action with time frames for addressing all of the executive director's recommendations from the inspection.

(b) Inspections by the owner.

(1) The owner, or the owner's representative, shall inspect the dam and appurtenant structures on a regular time frame as part of the owner's operation and maintenance procedures, as defined in §299.43 of this title (relating to Operation and Maintenance), following significant rainfall events, and during emergency events as described in §299.61 of this title (relating to Emergency Action Plans). The owner or the owner's representative shall perform maintenance inspections at least once a year.

(2) The owner shall notify the executive director by telephone or electronic mail within 72 hours and in writing within five working days after becoming aware of any problems or damage that pose a significant threat to the dam's safety, integrity, or operation.

(3) The owner shall submit a copy of all engineering inspection reports prepared by the owner's professional engineer under this section to the executive director for review within 45 calendar days after receipt of the report from the professional engineer. The report prepared by the owner's professional engineer must consist of the inspection date, description of the items observed during the inspection, the findings, and recommendations.

(4) The owner may elect to have an engineering inspection by a professional engineer more frequently than described in subsection (a)(2) of this section. The executive director may use the engineering inspection report prepared for the owner by the professional engineer in lieu of making a periodic inspection as described in subsection (a)(2) of this section. A report prepared by a professional engineer with the Federal Energy Regulatory Commission, Natural Resources Conservation Service, Bureau of Reclamation, Corps of Engineers, or Mine Safety and Health Administration may also be used in lieu of the periodic inspection described in subsection (a)(2) of this section.

§299.43. Operation and Maintenance.

(a) The owners of all dams shall develop and implement an operation and maintenance plan. The owner may use the most current version, at the time of the plan development, of the agency's *Guidelines for Operation and Maintenance of Dams in Texas,* a manual, a checklist, or some other procedure to demonstrate implementation of the program. Operation and maintenance activities that must be addressed include, but are not limited to:

(1) the schedules for both engineering and maintenance inspections performed by the owner or the owner's professional engineer;

(2) any restrictions imposed by the professional engineer's design;

(3) a list of maintenance items and a schedule for addressing each item, including, but not limited to:

(A) replacing riprap;

(B) eliminating animal burrows;

(C) removing blockage from the principal spillway inlet and outlet structures and removing obstructions from the emergency spillways, including fences;

(D) lubricating, repairing, painting, and exercising gates or valves, if in working condition, or if applicable;

(E) removing corrosion on gates and other metal appurtenant structures;

(F) sealing of cracks and joints in concrete;

(G) preventing or controlling erosion, including animal and vehicular trails and wave action erosion;

(H) eliminating small trees (less than or equal to four inches in diameter) and brush on the dam and all trees and brush in the spillways and adjacent to concrete structures;

(I) maintaining adequate grass cover on earthen dams and spillways;

(J) maintaining proper function of foundation or toe drains; and

(K) correcting any other items that may impact the dam or appurtenant structures; and

(4) if applicable, a plan for monitoring instrumentation in the dam and appurtenant structures, to include:

(A) a list of all types of instruments, instrument number, and locations;

(B) schedules and procedures for reading and maintenance of each instrument; and

(C) a list of critical readings for each instrument and the process to follow if critical readings are measured.

(b) The owner shall document operation and maintenance activities undertaken and shall provide the documentation to the executive director for review as soon as possible upon request of the executive director.

§299.44. Gate Operation Plan.

(a) The owners of all existing intermediate- and large-size dams, as defined in §299.13 of this title (relating to Size Classification Criteria), with gated spillways shall have a professional engineer develop a gate operation plan within two years after the effective date of the rules. The owner's professional engineer shall notify the executive director in writing that the gate operation plan has either been completed or a gate operation plan exists that meets the requirement of this section. If an owner cannot complete the gate operation plans within the two years required in subsection (b) of this section, the owner shall request an extension of time showing cause or

a reasonable basis for the need for an extension and providing a time frame to complete. The request shall be submitted to the executive director for review and approval.

(b) The gate operation plan must include:

(1) gate procedures for use during normal operating conditions, flood events, other varying hydrologic events, and power failures; and

(2) a method for coordinating releases with owners of other dams in the river basin, if applicable.

(c) The gate operation plan shall be considered an appendix to the owner's emergency action plan. If the owner submits a copy of the gate operation plan to the executive director, the executive director shall file it with the owner's emergency action plan in the agency's confidential, permanent records.

§299.45. Emergency Repairs.

(a) The owner shall undertake emergency repairs under the supervision of a professional engineer and implement the emergency action plan as soon as possible after the emergency is discovered and evaluated. The owner may start emergency repairs without approval from the executive director.

(b) The owner shall notify the executive director by telephone, electronic mail, or facsimile of the action being taken as soon as the emergency situation allows, but no more than 12 hours after the emergency is discovered and evaluated.

(c) The owner shall have a professional engineer develop plans for permanent repairs as soon as the emergency is over. The owner shall have a professional engineer submit the plans for review and approval, as described in §299.22 of this title (relating to Review and Approval of Construction Plans and Specifications).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806471
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER E. REMOVAL OR BREACH OF DAMS

30 TAC §299.51, §299.52

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.51. Removal or Breach of Dams.

(a) Owners proposing to remove or breach a dam, or owners ordered to remove a deficient dam by the executive director, the commission, or court action, shall submit final plans and specifications to the executive director for review and approval before start of work to remove or breach the dam.

(b) The owner shall have a professional engineer submit to the executive director sealed, signed, and dated plans for removing or breaching a dam as outlined in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*.

(c) The owner may be required to address environmental or social impacts as described in the most current version, at the time of the design, of the agency's *Dam Removal Guidelines*, which may require approval from other agencies before work can begin.

(d) The owner may be required to restore the dam site to blend with the topography of the lake area.

(e) If the plans for removal or breaching meet the requirements in subsection (b) of this section, the executive director shall issue written approval to the owner.

(f) The owner shall provide the executive director within 45 days after completion of the breach or removal a notification of completion. The executive director shall conduct an inspection after receipt of notification of completion to verify that the removal or breach has been completed in agreement with the plans.

§299.52. Abandonment of Dams.

If an owner abandons a dam at any time, regardless of hazard classification, the owner shall remove or breach the dam, as described in §299.51 of this title (relating to Removal or Breach of Dams), at the owner's expense, to eliminate any hazard to life and property downstream.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806473
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER F. EMERGENCY MANAGEMENT

30 TAC §299.61, §299.62

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

§299.61. Emergency Action Plans.

(a) The owners of all high- and significant-hazard dams, as defined in §299.13 of this title (relating to Size Classification Criteria) and §299.14 of this title (relating to Hazard Classification Criteria), shall prepare an emergency action plan to be followed by the owner in the event or threat of a dam emergency.

(b) The owner of an existing high- or significant-hazard dam shall submit the emergency action plan to the executive director for review within two years after the effective date of the rules unless an extension of the time frame is requested and approved by the executive director as described in subsection (d) of this section.

(c) The owner of a proposed high- or significant-hazard dam shall submit the emergency action plan to the executive director before either requesting closure of the dam or upon completion of construction of the dam, if the dam does not require a closure section.

(d) The owner shall prepare the emergency action plan using guidelines provided by the executive director or using a format approved by the executive director before the plan is prepared. If an owner owns more than one dam, the owner shall prepare a plan, with timelines, for preparing emergency action plans based on priority determined by hazard and submit the plan to the executive director for review. If an owner cannot complete the emergency action plan within the two years required in subsection (b) of this section, the owner shall request an extension of time showing cause or a reasonable basis for the need for an extension and providing a time frame to complete. The request shall be submitted to the executive director for review and approval.

(e) The executive director shall review the emergency action plan and provide any comments in writing to the owner.

(f) The executive director shall file the emergency action plan in the agency's confidential, permanent records.

(g) The owner shall review the emergency action plan annually, update the emergency action plan as necessary, and submit a copy of the updated portions of the emergency action plan to the executive director annually beginning three years after the effective date of this section. If the emergency action plan was reviewed by the owner and no updates were necessary, the owner shall submit written notification to the executive director that no updates to the emergency action plan have been adopted or implemented.

(h) The owner shall perform a table top exercise of the emergency action plan on the frequency provided in the owner's emergency action plan, or at least every five years. A table top exercise is a meeting of the owner and the state and local emergency management personnel in a conference room setting.

§299.62. Security of Dams.

(a) Owners of high-hazard dams that are notified in writing by the executive director within six months of the effective date of these rules of dams that may need increased security shall address:

(1) security at the owner's dams to prevent unauthorized operation or access; and

(2) backup power requirements to ensure operation of the dam and appurtenant structures.

(b) The owner shall develop a security plan for the dam within two years of being notified by the executive director and shall submit the security plan to the executive director for review and comment. If an owner cannot complete the security plan within the two years, the owner shall request an extension of time showing cause or a reasonable basis for the need for an extension and providing a time frame to complete. The request shall be submitted to the executive director for review and approval.

(c) The executive director shall file the security plan in the agency's confidential, permanent files.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806475
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

SUBCHAPTER G. ENFORCEMENT

30 TAC §299.71, §299.72

STATUTORY AUTHORITY

These new sections are adopted under the authority granted to the commission in Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, such as dam safety; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §12.052, which establishes the commission's authority to promulgate rules for the safe construction, maintenance, repair, and removal of dams located in this state; and §7.002, which authorizes the commission to enforce provisions of the TWC.

These adopted new sections implement TWC, §§5.103, 5.105, and 12.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2008.

TRD-200806476
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 1, 2009
Proposal publication date: July 25, 2008
For further information, please call: (512) 239-2548

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.583

The Comptroller of Public Accounts adopts an amendment to §3.583, concerning margin: exemptions, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9054).

Internal Revenue Code (IRC), §501(c)(16), included in subsection (i)(1)(A) in error, is deleted.

Subsection (i)(10) is amended to delete the reference of subsection (e) and correctly reflect subsection (f).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.063.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806435
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 936-6472

♦ ♦ ♦

34 TAC §3.584

The Comptroller of Public Accounts adopts an amendment to §3.584, concerning margin: reports and payments, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9055).

Amendments to subsection (b) clarify the reporting requirements of nontaxable entities. Paragraph (1), which relates mainly to the transition year of the revised franchise tax, is deleted. Language is added to require that a nontaxable entity reply to the comptroller within 30 days when asked in writing if the entity is taxable.

Language regarding privilege periods is deleted from subsections (c)(1)(B) and (C) as privilege periods no longer affect the calculation of the franchise tax. Detailed information regarding combined reporting is deleted from paragraph (1)(H). The subparagraph refers to §3.590 of this title (relating to Margin: Combined Reporting) for the rules on filing a combined report. The information in paragraph (3), regarding reporting requirements when no tax is due, is incorporated in subsection (d)(5) and subsection (c)(3) is deleted.

The title of subsection (d)(1) is amended to read "Annual Election" and the title "Calculation" is deleted. Further information regarding the annual election to deduct cost of goods sold or compensation and the restrictions that apply when amending that election is added. The portion of subsection (d)(1) regarding the calculation of margin is now subsection (d)(2) and is re-titled "Calculation". Subsequent paragraphs of this subsection are renumbered accordingly. Paragraph (4), regarding the calculation of annualized total revenue, is added. Taxable entities that have an accounting period that is more or less than 12 months must annualize total revenue to determine eligibility for the $300,000 no tax due threshold, discount, and E-Z Computation. Examples of the calculation are included. Subsequent paragraphs of this subsection are renumbered accordingly. Paragraph (5) is amended and expanded to clarify under what circumstances no tax is due and which reports must be filed when no tax is due. Language is added to clarify that combined groups and entities that have tax due of less than $1,000 are not qualified to file a No Tax Due Information Report. Paragraph (6) is amended to state that annualized total revenue must be used to determine a taxable entity's discount percentage. Paragraph (7) is amended to state that annualized total revenue must be used to determine a taxable entity's eligibility for the E-Z Computation. This subsection is also amended to describe the E-Z Computation more concisely and to emphasize that a deduction for cost of goods sold or compensation is not allowed when using the E-Z Computation. Paragraph (8) is amended to include specific references to §3.587 of this title for information concerning the tiered partnership provision. This subsection is also amended to include the upper tier entity's reporting requirement.

Subsection (f) is amended to properly identify where it should be noted on a report that the report is amended. Paragraph (1) is amended to clarify what methods of determining margin may be used in filing an amended report after the due date of the report.

Subsection (i) is amended to include financial institutions with corporations and limited liability companies as taxable entities that must file a public information report and to clarify that all other taxable entities must file an ownership information report. This subsection is also amended to clarify that it is the legal formation of the entity that determines if it is a corporation, limited liability company or a financial institution.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implement Tax Code, §§171.0021, 171.101, 171.1015, 171.1016, 171.202, and 171.203.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806436
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.585

The Comptroller of Public Accounts adopts an amendment to §3.585, concerning margin: annual report extensions, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9058).

Subsection (c)(3)(B) is amended to add that a separate entity that was included in a combined report originally due in the previous calendar year may not use the 100% extension option.

Subsection (f) is amended to clarify that a combined group is required to make its franchise tax payments by electronic funds transfer if any member of the combined group receives notice of the requirement. Subsection (f)(3)(A) is amended to correct the due date of the first extension for entities that are required to make franchise tax payments by electronic funds transfers to August 15. Subsection (f)(3)(B) is amended to add that a separate entity that was included in a combined report originally due in the previous calendar year may not use the 100% extension option.

Subsection (g) is amended to clarify that it concerns the second extension for entities that are required to make franchise tax payments by electronic funds transfers.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.202.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806437
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 936-6472

♦ ♦ ♦

34 TAC §3.587

The Comptroller of Public Accounts adopts an amendment to §3.587, concerning margin: total revenue, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9058).

Subsection (b)(1) is amended to reflect a change in policy regarding how the actual cost of uncompensated care is calculated. Paragraph (3) is being amended to define health care institutions as specifically defined in the statute. Paragraph (15), which defines uncompensated care, is deleted. Uncompensated care is now defined under paragraph (1). Subsequent paragraphs have been renumbered.

Subsection (c)(5) is amended to more narrowly interpret Tax Code, §171.1011(j). Only expenses excluded from total revenue may not be included in the determination of the cost of goods sold or compensation. Language that did not allow costs related to excluded revenue to be included in the determination of the cost of goods sold or compensation is deleted. Paragraph (8) has been expanded to clarify the reporting process for entities in a tiered partnership arrangement that choose to file under the tiered partnership provision.

Subsection (e)(3), regarding the exclusion from total revenue for principal repayments, is amended to add language from the statute which restricts the exclusion to lending institutions only. Language is added to paragraph (7) to clarify that an exclusion from revenue is not allowed for payments received by a staff leasing services company from a client company for independent contractors whose wages are reportable on Internal Revenue Service Form 1099. Language in paragraph (10)(A) that did not allow a revenue exclusion for co-payments and deductibles received from a patient under the specified health care programs is deleted. Language that allows co-payments and deductibles received from the patient and supplemental insurance under the specified health care programs to be excluded from total revenue is added.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.1011 and §171.1015.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806438
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.589

The Comptroller of Public Accounts adopts an amendment to §3.589, concerning margin: compensation, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9063).

Language is added to subsection (b)(9)(A) to clarify that wages and cash compensation is the amount entered in the Medicare wages and tips box for the period on which the tax is based. Language is added to paragraph (9)(B) to clarify that wages and cash compensation includes net distributive income regardless of whether it is a positive or negative amount.

Language is added to subsection (c) regarding the calculation of compensation to reference subsection (i) of this section regarding the election to deduct compensation. Language is added to paragraph (1) to clarify that the $300,000 per person limit on wages and cash compensation is per 12-month period on which the tax is based.

Language is added to subsection (d)(1) to clarify that payments made to independent contractors are those payments that are reportable on Internal Revenue Form 1099. Paragraph (2) regarding items excluded from compensation is amended to more narrowly interpret Tax Code, §171.1011(j) by deleting language that mandated that costs related to any amount excluded from total revenue may not be included in the determination of compensation. Language to clarify that only expenses that have been excluded from total revenue may not be included in the determination of compensation is added.

Subsections (f)(1), (2) and (3) regarding staff leasing companies, have been reworded to clarify that the specified payments cannot be included as compensation. New paragraph (1)(D) is added to clarify that a staff leasing company cannot include as compensation payments made to independent contractors. Paragraph (3)(B) is added to clarify that the client company of a staff leasing company may not include as compensation payments made to the staff leasing company as reimbursement for payments made to independent contractors assigned to the client company.

New subsection (i) is added to clarify how and when a taxable entity elects to deduct compensation to determine margin and what restrictions apply when amending that election.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.101, 171.1011(j) and 171.1013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806439

Ashley Harden

Chief Deputy General Counsel

Comptroller of Public Accounts

Effective date: January 1, 2009

Proposal publication date: November 7, 2008

For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.590

The Comptroller of Public Accounts adopts an amendment to §3.590, concerning margin: combined reporting, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9064).

Subsection (b)(2)(E), which states that insurance companies that pay gross premiums tax that are not included in a combined group is unnecessary and is deleted. Section 3.583(d)(1) of this title (relating to Margin: Exemptions) states that insurance companies that are subject to the gross premiums tax are exempt from payment of the franchise tax and §3.590(b)(2)(B) states that a combined group may not include any exempt entity. The subsequent subparagraphs have been renumbered.

Subsection (b)(4)(B)(vi), a controlling interest example, is amended to clarify that the ownership percentages of the partnership are equal. A controlling interest example is added as paragraph (4)(B)(vii) to clarify that two individuals that each own 50% of two different partnerships would not constitute controlling interest, as neither individual owns more than 50% of each partnership. Language is added to paragraph (4)(C), (D), (E) and (F) to identify the information contained in these subparagraphs. Paragraph (5)(A) is amended to restrict the reporting entity to a parent entity that is part of the combined group, rather than the unitary business.

Subsection (d)(4) is amended to delete the election language for the use of the 70% of revenue calculation because no election is necessary. Language was added to clarify that the use of the E-Z Computation is only allowed for qualifying taxable entities. Language is added to paragraph (6) to identify the information contained in the paragraph. Subsection (d)(5)(C)(i) and (ii) are amended to clarify that a member of a combined group that does not have nexus individually must report, for information purposes only, the member's gross receipts from business done in this state and the member's gross receipts from business done in this state that are subject to taxation in another state under a throwback law.

Subsection (f)(2) is amended to correctly note that members of a combined group with different accounting periods must prepare a separate income statement based on federal income tax reporting methods, not the books and records of the taxable entity as originally noted.

Language is added to subsection (i) to identify the information contained in the subsection.

Subsection (j) is amended to include not only information on the tax rate, but also information on the discounts from tax liability and the E-Z Computation. Language that allows a combined group to file a no tax due report is deleted.

New subsection (k) is added to clarify the reporting requirements for a combined group. A combined group will file only annual reports. Members of a combined group that join or leave the combined group during the accounting period may be required

to file separate initial, annual, and final reports. Examples are included.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.0011, 171.002, 171.0021, 171.1014, 171.1016, 171.152, 171.1532, 171.201, and 171.202.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806440
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.592

The Comptroller of Public Accounts adopts an amendment to §3.592, concerning margin: additional tax, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9067).

Subsection (e) is amended to delete reference of final report information for combined groups. Detailed information on final reporting for combined groups is being addressed in §3.590, which is also being amended.

No comments were received regarding adoption of the amendment.

This rule is amended under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.0011.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806441
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §3.594

The Comptroller of Public Accounts adopts an amendment to §3.594, concerning margin: temporary credit for business loss carryforwards, without changes to the proposed text as published in the November 7, 2008, issue of the *Texas Register* (33 TexReg 9067).

Subsection (c)(4), an example of the credit calculation for a combined group, is amended to correct mathematical errors.

Subsection (g), regarding credit carryover, is amended to reflect a change in policy. The revised policy applies the temporary credit to the franchise tax due only if the tax due exceeds $1,000. The prior policy, which required the credit to be used to the extent that there was any positive amount of tax due, is deleted.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.111.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806442
Ashley Harden
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: January 1, 2009
Proposal publication date: November 7, 2008
For further information, please call: (512) 475-0387

♦ ♦ ♦

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 113. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM QUALIFIED REPLACEMENT BENEFIT ARRANGEMENT

34 TAC §113.4

The Texas County and District Retirement System adopts amended rule §113.4, concerning the method and manner of segregating payments due a Benefit Recipient participating in the TCDRS Qualified Replacement Benefit Program. This amended rule is adopted without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8892). The amended rule provides that a subdivision participating in the program will segregate from its monthly employer contribution for direct payment to, or on behalf of, the Benefit Recipient the gross amount determined by the system as required under the program, and for direct payment to the retirement system of any amounts required to

reimburse the system for any expenses incurred by the system in administering the program.

No comments were received regarding adoption of this rule.

The rule is adopted under the Government Code §845.505, which authorizes the board of trustees of the Texas County and District Retirement System by rule to establish an excess benefit program and to provide for the transfer of contributions with respect to that program; and §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806395
Brad Goodsell
General Counsel
Texas County and District Retirement System
Effective date: December 28, 2008
Proposal publication date: October 31, 2008
For further information, please call: (512) 637-3230

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.29, concerning the responsibilities of agency chief administrators, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8895) and will not be republished.

The amendment adds language to 37 TAC §211.29(e) clarifying the requirements for changing a licensee's file. Subsections (d) and (i) are amended to delete two terms: "working" and "business." Subsection (k) is amended to ensure that chief administrators notify the Commission of any change of the agency's name, address, phone number, or electronic mail address.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151 General Powers of Commission; Rulemaking Authority and §1701.153 Reports from Agencies and Schools.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2008.

TRD-200806375
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.3, concerning academy licensing, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8896) and will not be republished.

The amendment adds language to §215.3(b)(8) to replace the social security number with personal identification number (PID) and clarifying the academy staff requirement. A new subsection (c)(1) is added to match the training coordinator requirements of other types of training providers, and the subsequent items are renumbered. Subsection (c)(8) is amended to match the definition of a law enforcement automobile for training. Subsection (i)(1) is amended to clarify the reasons an academy license may be revoked.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.153, General Powers of Commission; Rulemaking Authority, §1701.251, Training Programs; Instructors, and §1701.254, Risk Assessment and Inspections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2008.

TRD-200806376
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.1, concerning minimum standards for initial licensure, without changes to the proposed text as published in the October 31, 2008 issue of the *Texas Register* (33 TexReg 8896) and will not be republished.

The amendment adds language to §217.1(a)(2) is amended to eliminate the term armed from public security officers in order to be consistent with the definition in §1701.001 of the Texas Occupations Code. Subsection (a)(5) is amended to reflect the conviction prohibitions found in §215.15(a)(2)(A). This amendment will coordinate the enrollment and the licensure prohibitions. Subsection (a)(12)(B) is amended to reflect changes in the Psychologists' Licensing Act, Chapter 501 of the Texas Occupations Code. Subsection (g)(4) is amended to in order to be consistent with other language concerning the validity of an endorsement. Subsection (j) is amended to reflect the general provisions for Constables, §86.0021 of the Local Government Code.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of Commission; Rulemaking Authority; §1701.001, Definitions; §1701.255, Enrollment Qualifications; §1701.312, Disqualification: Felony Conviction or Placement on Community Supervision; §1701.313, Disqualification: Conviction of Barratry; §1701.306, Psychological and Physical Examination; §501.004, Applicability; §1701.304, Examination; §1701.003, Application of Chapter and Local Government Code; §86.0021 Qualifications; Removal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806394
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

37 TAC §217.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.9, concerning continuing education credit for licensees, without changes to the proposed text as published in the October 31, 2008 issue of the *Texas Register* (33 TexReg 8898) and will not be republished.

Subsection (b)(7) was deleted to apply a single standard to all types of training providers and renumbering of the remaining paragraph.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151 General Powers of Commission; Rulemaking Authority and §1701.352 Continuing Education Programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806397
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.11, concerning legislatively required continuing education for licensees, without changes to the proposed text as published in the October 31, 2008 issue of the *Texas Register* (33 TexReg 8898) and will not be republished.

The amendment adds language to §217.11(a) to reflect the 40 hour training requirement for peace officers in Texas Occupations Code §1701.351(a). Subsection (b) is amended to reflect the 48 month training requirement in §1701.352(b) and §1701.352(e). Subsection (k) is amended to allow for the different training requirements assigned to each license.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of Commission; Rulemaking Authority, §1701.351, Continuing Education Required For Peace Officers, and §1701.352, Continuing Education Programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806398
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

37 TAC §217.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.15,

concerning waiver of legislatively required continuing education, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8899) and will not be republished.

The amendment adds language to §217.15(c) to clarify the waiver is for mitigating circumstances and to change from expiration of a license to the end of the training unit. Subsection (d) is amended to reflect the changes to subsection (c). Subsection (e) is amended to clarify the timeframe for requesting a waiver for civil process training.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of Commission; Rulemaking Authority, §1701.353, Continuing Education Procedures, and §1701.354, Continuing Education For Deputy Constables.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806400
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

37 TAC §217.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.19, concerning reactivation of a license, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8900) and will not be republished.

The amendment adds language to §217.19(e) to clarify the reactivation process. Subsection (e)(5) is deleted for clarity. Subsection (e)(6) is amended to be consistent with other language concerning the validity of an endorsement. Subsection (f) is added to identify the requirements for retiree reactivation in accordance with Texas Occupations Code §1701.3161 and House Bill 1955.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of Commission; Rulemaking Authority, §1701.316, Reactivation of Peace Officer License, §1701.3161, Reactivation of Peace Officer License: Retired Peace Officers, and §1701.304, Examination.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2008.

TRD-200806405
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §221.1, concerning proficiency certificate requirements, with changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8900) and will be republished.

The amendment adds language to §221.1(a)(2) to include the Retired Peace Officer and Federal Law Enforcement Officer Firearms Proficiency certificate. Subsection (a)(2) is further amended to remove Homeowners Insurance Inspector Proficiency as §5.33A was repealed from the Insurance Code.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of Commission; Rulemaking Authority, and §1701.402, Proficiency Certificates.

§221.1. Proficiency Certificate Requirements.

(a) To qualify for proficiency certificates, applicants must meet all the following proficiency requirements:

(1) submit any required application currently prescribed by the commission, requested documentation, and any required fee;

(2) have an active license or appointment for the corresponding certificate (not a requirement for Mental Health Officer Proficiency, Retired Peace Officer and Federal Law Enforcement Officer Firearms Proficiency, Firearms Instructor Proficiency, Firearms Proficiency for Community Supervision Officers, or Instructor Proficiency);

(3) officers licensed after the effective date of this rule must not currently have license(s) under suspension by the Commission;

(4) meet the continuing education requirements for the previous training cycle; and

(5) for firearms related certificates, not be prohibited by state or federal law or rule from attending training related to firearms or from possessing a firearm.

(b) The commission may refuse an application if:

(1) an applicant has not been reported to the commission as meeting all minimum standards, including any training or testing requirements;

(2) an applicant has not affixed any required signature;

(3) required forms are incomplete;

(4) required documentation is incomplete, illegible, or is not attached; or

(5) an application contains a false assertion by any person.

(c) The commission shall cancel and recall any certificate if the applicant was not qualified for its issue and it was issued:

(1) by mistake of the commission or an agency; or

(2) based on false or incorrect information provided by the agency or applicant.

(d) If an application is found to be false, any license or certificate issued to the appointee by the commission will be subject to cancellation and recall.

(e) Academic degree(s) must be issued by an accredited college or university.

(f) The effective date of this section is January 1, 2009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806401
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

37 TAC §221.17

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §221.17, concerning homeowners insurance inspector proficiency, without changes to the proposal as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8901) and will not be republished.

The repeal of §221.17 is being adopted because the authority for that certificate, §5.33A, was repealed from the Insurance Code. The effective date of this repeal will be January 1, 2009.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Occupations Code, §1701.151, General Powers of Commission; Rulemaking Authority, and §1701.402, Proficiency Certificates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806402
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

CHAPTER 223. ENFORCEMENT

37 TAC §223.17

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.17, concerning reinstatement of a license, without changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8901) and will not be republished.

Subsection (b)(3) is amended by changing "endorsement of eligibility" to "endorsement" to be consistent with other rules. Subsection (c) is amended to reflect the effective date of this change.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Occupations Code, §1701.151, General Powers of Commission; Rulemaking Authority, §1701.501, Disciplinary Action, and §1701.502, Felony Conviction or Placement on Community Supervision.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2008.

TRD-200806403
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-7713

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 41. CONSUMER DIRECTED SERVICES OPTION

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §41.307 and §41.407, in Chapter 41, Consumer Directed Services Option, without changes to the proposed text published in the August 1, 2008, issue of the *Texas Register* (33 TexReg 6086).

The amendment to §41.307 is adopted to update DADS rules to reflect the HHSC Rate Analysis Department's revised rate setting methodology approved by the Centers for Medicare and Medicaid Services.

The amendment to §41.407 is adopted because termination of Consumer Directed Services may not be recommended by a service planning team if a service recipient who is also the employer has a criminal conviction.

DADS received no comments regarding adoption of the amendments.

SUBCHAPTER C. ENROLLMENT AND RESPONSIBILITIES OF CONSUMER DIRECTED SERVICES AGENCIES

40 TAC §41.307

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806445
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER D. ENROLLMENT, TRANSFER, SUSPENSION, AND TERMINATION

40 TAC §41.407

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806446
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

CHAPTER 43. SERVICE RESPONSIBILITY OPTION

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts new §§43.1 - 43.4, 43.11 - 43.19, 43.21, 43.22, 43.31 - 43.33, 43.41, 43.42, 43.51, 43.61, and 43.71, in Chapter 43, Service Responsibility Option. New §43.4 is adopted with changes to the proposed text published in the August 1, 2008, issue of the *Texas Register* (33 TexReg 6087). New §§43.1 - 43.3, 43.11 - 43.19, 43.21, 43.22, 43.31 - 43.33, 43.41, 43.42, 43.51, 43.61, and 43.71 are adopted without changes to the proposed text.

The new sections govern the service responsibility option (SRO). Senate Bill 1766 (80th Legislature, Regular Session, 2007) amended Texas Government Code, §531.051, to add the SRO to the array of service delivery options for community services to allow a service recipient to exercise greater control over the development and implementation of the service recipient's service plan.

The SRO is a service delivery option in which a service recipient or a service recipient's representative, who wants some control over service providers but may not want to assume all employer responsibilities required by the consumer directed services (CDS) option, selects, trains, and supervises a service provider, while payroll and personnel functions remain with an SRO provider.

DADS received a written comment from the Texas Association for Health Care (TAHC). A summary of the comment and the response follow.

Comment: Concerning §43.4(14), the commenter recommended the language read, "A documented plan to ensure that critical program services delivered through the SRO are provided to an individual when normal service delivery is interrupted" to clarify that the back-up plan applies only to the services in the service plan that are agreed to by an individual and the SRO provider.

Response: The agency agrees and has deleted "or there is an emergency" from the definition of service back-up plan because emergency procedures are included in the service plan, but not in the service back-up plan.

Comment: Concerning §43.22(e)(1)(B), the commenter recommended changing the requirement that an SRO provider notify a case manager or service coordinator of issues related to an individual's participation in the SRO within seven days after becoming aware of an issue to notification "per program requirements."

Response: DADS does not agree with the recommendation because not all programs that offer the SRO have specific require-

ments related to notification. The rule language was not changed in response to the comment.

Comment: Concerning §43.22(e)(1)(B)(iv), the commenter stated that the responsibility for notification of the utilization of services for the SRO should be per program rules because programs have different rules assigning notification responsibility.

Response: DADS does not agree with the recommendation because not all programs that offer the SRO have specific requirements related to notification. The rule language was not changed in response to the comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §§43.1 - 43.4

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

§43.4. Definitions.

The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

(1) Adult--A person who is 18 years of age or older.

(2) Applicant--Depending on the context, an applicant is:

(A) a person applying for employment with an SRO provider;

(B) a person or legal entity applying for a contract with an SRO provider to deliver services to an individual; or

(C) a person applying for services through a program.

(3) Case manager--A person who provides case management services to an individual. The case manager assists an individual who receives program services in gaining access to needed services, regardless of the funding source for the services, and assists with other duties as required by the individual's program.

(4) CDSA--Consumer directed services agency. A provider contracting with DADS that provides financial management services.

(5) CDS option--Consumer Directed Services option. A service delivery option in which an individual or LAR employs and retains service providers and directs the delivery of program services as described in Chapter 41 of this title (relating to Consumer Directed Services Option).

(6) DADS--The Department of Aging and Disability Services.

(7) Entity--An organization that has a legal identity such as a corporation, limited partnership, limited liability company, professional association, or cooperative.

(8) Individual--A person enrolled in a program.

(9) LAR--Legally authorized representative. A person authorized or required by law to act on behalf of an individual with regard to a matter described in this chapter, including a parent, guardian, managing conservator of a minor, or the guardian of an adult.

(10) Management agreement--A negotiated agreement between an individual and an SRO provider that establishes each party's responsibilities to create and sustain quality services. A management agreement also establishes a schedule for the individual or LAR and the SRO provider to meet to assess the individual's well-being and the quality of services provided.

(11) Program--A community services program administered by DADS.

(12) Provider--An entity that has a contract with DADS to provide program services.

(13) Representative--A willing adult who volunteers to assist an individual or LAR with selection, training, and daily management of a service provider.

(14) Service back-up plan--A documented plan to ensure that critical program services delivered through the SRO are provided to an individual when normal service delivery is interrupted.

(15) Service coordinator--An employee of a mental retardation authority who is responsible for assisting an applicant, individual, or LAR to access needed medical, social, educational, and other appropriate services, including program services. A service coordinator provides case management services to an individual.

(16) Service plan--A document developed in accordance with rules governing an individual's program to identify the program services to be provided to the individual, the number of units of each service to be provided, and the projected cost of each service.

(17) Service planning team--A group of people determined by the requirements of an individual's program that meet to discuss and make decisions or recommendations regarding an individual's program services. Some programs refer to the service planning team as an interdisciplinary team.

(18) Service provider--An employee, contractor, or vendor of the SRO provider.

(19) SRO--Service responsibility option. A service delivery option in which an individual or LAR selects, trains, and provides daily management of a service provider, while the fiscal, personnel, and service back-up plan responsibilities remain with an SRO provider.

(20) SRO orientation--A mandatory training provided by a support advisor to inform an individual or LAR about SRO responsibilities and tools to use for successful management of the SRO.

(21) SRO provider--A provider who volunteers to enroll as an SRO provider and amend its program services contract to allow an individual receiving one or more services from the provider to have a service delivered through SRO.

(22) Support advisor--A person who provides support consultation to an employer, representative, or individual receiving services through the SRO.

(23) Support consultation--A service provided by a support advisor that provides the required SRO orientation and additional support when needed by the individual to effectively carry out responsibilities under the SRO. Support consultation helps an individual or LAR meet the required daily management responsibilities of the SRO.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806447
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER B. RESPONSIBILITIES OF INDIVIDUALS CHOOSING TO PARTICIPATE IN THE SRO

40 TAC §§43.11 - 43.19

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806448
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER C. RESPONSIBILITIES OF AN SRO PROVIDER

40 TAC §43.21, §43.22

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806449
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER D. TERMINATION OF THE SRO

40 TAC §§43.31 - 43.33

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806450
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER E. SUPPORT CONSULTATION

40 TAC §43.41, §43.42

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806451
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER F. BUDGET

40 TAC §43.51

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806452
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER G. REPORTING ALLEGATIONS

40 TAC §43.61

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806453
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER H. OVERSIGHT

40 TAC §43.71

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2008.

TRD-200806454

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2009
Proposal publication date: August 1, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 297 (§§297.1 - 297.9) concerning Pharmacy Technicians and Pharmacy Technician Trainees, pursuant to the Texas Government Code §2001.039, regarding Agency review of Existing Rules.

Comments regarding whether the reason for adopting the rule continues to exist may be submitted to Allison Benz, R.Ph., M.S., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Austin, Texas 78701, Fax (512) 305-8082. Comments must be received by 5 p.m., January 30, 2009.

TRD-200806500
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 15, 2008

♦ ♦ ♦

Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas files this notice of intention to review and re-adopt 16 TAC Chapter 3, relating to Oil and Gas Division. This review is being conducted in accordance with Texas Government Code, §2001.039. The agency's reasons for adopting these rules continue to exist.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Kellie Martinec at (512) 475-1295. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

TRD-200806520
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: December 16, 2008

♦ ♦ ♦

The Railroad Commission of Texas files this notice of intention to review and re-adopt 16 TAC Chapter 11, relating to Surface Mining and Reclamation Division. This review is being conducted in accordance with Texas Government Code, §2001.039. The agency's reasons for adopting these rules continue to exist.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Kellie Martinec at (512) 475-1295. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

TRD-200806521
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: December 16, 2008

♦ ♦ ♦

The Railroad Commission of Texas files this notice of intention to review and re-adopt 16 TAC Chapter 12, relating to Coal Mining Regulations. This review is being conducted in accordance with Texas Government Code, §2001.039. The agency's reasons for adopting these rules continue to exist.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Kellie Martinec at (512) 475-1295. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

TRD-200806522

Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: December 16, 2008

♦ ♦ ♦

Adopted Rule Reviews

Comptroller of Public Accounts

Title 34, Part 1

The Comptroller of Public Accounts adopts the review of Texas Administrative Code, Title 34, Part 1, Chapter 3, concerning Tax Administration, pursuant to Government Code, §2001.039. The review assessed whether the reason for adopting the chapter continues to exist.

The comptroller received no comments on the proposed review, which was published in the September 5, 2008, issue of the *Texas Register* (33 TexReg 7577).

Relating to the review of Chapter 3, Subchapters B, C, D, E, G, H, I, J, S, W, Z, AA, BB, CC, DD, EE, HH, JJ, KK, LL, and NN continue to exist and the comptroller readopts the sections without changes in accordance with the requirements of Government Code, §2001.039.

As a result of the review of Chapter 3, the following subchapters are being amended, Subchapter A, §§3.1 - 3.4 and 3.7, Subchapter F, §§3.61, 3.64, 3.68 - 3.70, 3.72, 3.73, 3.75, 3.78, 3.79, 3.88, 3.90, and 3.95, Subchapter K, §3.161 and §3.163, Subchapter M, §§3.225 - 3.230, Subchapter N, §3.251 and §3.252, Subchapter O, §§3.283, 3.288, 3.294, 3.298, 3.312, 3.314, 3.315, 3.318, 3.321, 3.322, 3.324, 3.325, 3.329, 3.330, 3.333, 3.338, 3.344 - 3.347, 3.355 - 3.357, 3.361, and 3.367, Subchapter P, §3.374, Subchapter R, §3.424, Subchapter T, §3.481, Subchapter U, §3.511, Subchapter V, §3.591 and §3.592, Subchapter X, §3.641, Subchapter GG, §§3.809, 3.822, 3.830, 3.831, and 3.833, and Subchapter II, §3.1101. The sections will be amended in separate rulemakings in accordance with the Texas Administrative Procedure Act.

As a result of the review of Chapter 3, the comptroller will propose the repeal of Subchapter A, §3.10, and Subchapter V, §3.572 and §3.577, in a separate rulemaking in accordance with the Texas Administrative Procedure Act.

This concludes the review of Texas Administrative Code, Title 34, Part 1, Chapter 3.

TRD-200806537
Martin Cherry
General Counsel
Comptroller of Public Accounts
Filed: December 17, 2008

♦ ♦ ♦

State Pension Review Board

Title 40, Part 17

The State Pension Review Board (PRB) files notice of the completion of the review and re-adoption of Texas Administrative Code (TAC), Title 40, Part 17, Chapter 601, General Provisions.

In accordance with the requirement of Texas Government Code, §2001.039, the PRB reviewed Chapter 601, General Provisions, and has determined that the reasons for adopting or re-adopting these rules continue to exist.

The PRB received no comments on the proposed rule review, which was published in the October 10, 2008, issue of the *Texas Register* (33 TexReg 8561).

The rules are re-adopted by the PRB in accordance with Texas Government Code, §2001.039. This concludes the review of 40 TAC Chapter 601, General Provisions.

The PRB hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

TRD-200806535
Lynda Baker
Staff Services Officer
State Pension Review Board
Filed: December 16, 2008

♦ ♦ ♦

The State Pension Review Board (PRB) files notice of the completion of the review and re-adoption of Texas Administrative Code (TAC), Title 40, Part 17, Chapter 603, Officers and Meetings.

In accordance with the requirement of Texas Government Code, §2001.039, the PRB reviewed Chapter 603, Officers and Meetings, and has determined that the reasons for adopting or re-adopting these rules continue to exist.

The PRB received no comments on the proposed rule review, which was published in the October 10, 2008, issue of the *Texas Register* (33 TexReg 8561).

The rules are re-adopted by the PRB in accordance with Texas Government Code, §2001.039. This concludes the review of 40 TAC Chapter 603, Officers and Meetings.

The PRB hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

TRD-200806536
Lynda Baker
Staff Services Officer
State Pension Review Board
Filed: December 16, 2008

♦ ♦ ♦

Texas Residential Construction Commission

Title 10, Part 7

The Texas Residential Construction Commission adopts 10 TAC §§304.1 - 304.3, 304.10 - 304.33, 304.50 - 304.52 and 304.100 as a result of its rule review of Chapter 304 relating to warranties and building and performance standards.

The proposed review was published in the October 17, 2008, issue of the *Texas Register* (33 TexReg 8651). No written comments were received regarding the proposed intention of review. The agency's reason for adopting §§304.1 - 304.3, 304.10 - 304.33, 304.50 - 304.52 and 304.100 continues to exist.

TRD-200806461
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: December 12, 2008

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §307.3(c)(1)

Chart 1: Degrees of Relationship

Degrees of Relationship to the Builder/Remodeler or Builder/Remodeler's Spouse	
Reminder: Relationships through adoption and step-relationships are treated as though the individuals are related by full blood.	
First Degree • Child • Parent • Husband/Wife	**Second Degree** • Grandchild • Sister/Brother • Grandparent
Third Degree • Great-grandchild • Niece/Nephew • Aunt/Uncle • Great-grandparent	**Fourth Degree** • 1st Cousin • Great-great-grandchild • Grandniece/grandnephew • Great Aunt/Uncle • Great-great-grandparent

Notes:

1. Relationships of consanguinity are those where individuals are related by kinship. Two persons are related to each other by consanguinity if one is a descendant of the other or if they have a common ancestor.

2. Relationships by affinity are those where individuals are related by marriage. Two persons are related to each other by affinity if they are married to each other or if the spouse of one of the persons is related by consanguinity to the other person.

3. Consanguine relationships include those by half-blood and legal adoption, as though the individuals are related by full blood.

4. Step-relationships are treated as though the individuals are related by full blood. For example, if a builder/remodeler is the step-parent and the fee inspector is the step-child, then the individuals are treated as if they are parent and child and are in the first degree of consanguinity.

5. A husband and wife are related to each other in the first degree by affinity. Other relationships by affinity to the builder/remodeler or builder/remodeler's spouse are treated as having the same degree of relationship as the degree of the underlying relationship by consanguinity. For example, if a builder/remodeler and fee inspector are related to each other in the second degree by consanguinity, the spouse of the builder/remodeler is related to the fee inspector in the second degree by affinity and the spouse of the fee inspector is related to the builder/remodeler in the second degree by affinity.

6. Termination of a marriage by divorce or the death of a spouse terminates the relationships by affinity created by that marriage. However, if a child of that marriage is living, then that marital relationship is treated as continuing to exist as long as a child of that marriage is still living.

Figure: 30 TAC §101.379(c)(2)(A)

$$\text{Flow Control Limit} = B + (C_1 - C_2) + (D_1 - D_2)$$

Where:

Flow Control Limit = total daily amount of Discrete Emission Reduction Credits (DERCs) allowed for use during any 24-hour period, from midnight to midnight;

B = the 2009 annual flow control limit prescribed in the Dallas-Fort Worth Eight-Hour Ozone Attainment Demonstration State Implementation Plan Revision for the 1997 eight-hour ozone standard;

C_1 = the estimated emission reductions associated with fleet turnover from mobile sources during the previous calendar year;

C_2 = the emission reduction associated with the contingency requirement for the current calendar year ; For the 2010 calendar year control period this term is equal to 12.98 tons per day;

D_1 = DERCs generated on or after March 1, 2009, and approved for use in the previous calendar year or the 2009 control period; and

D_2 = DERCs generated on or after March 1, 2009, and used in the previous calendar year or the 2009 control period.

Figure: 30 TAC §299.1(a)(2)

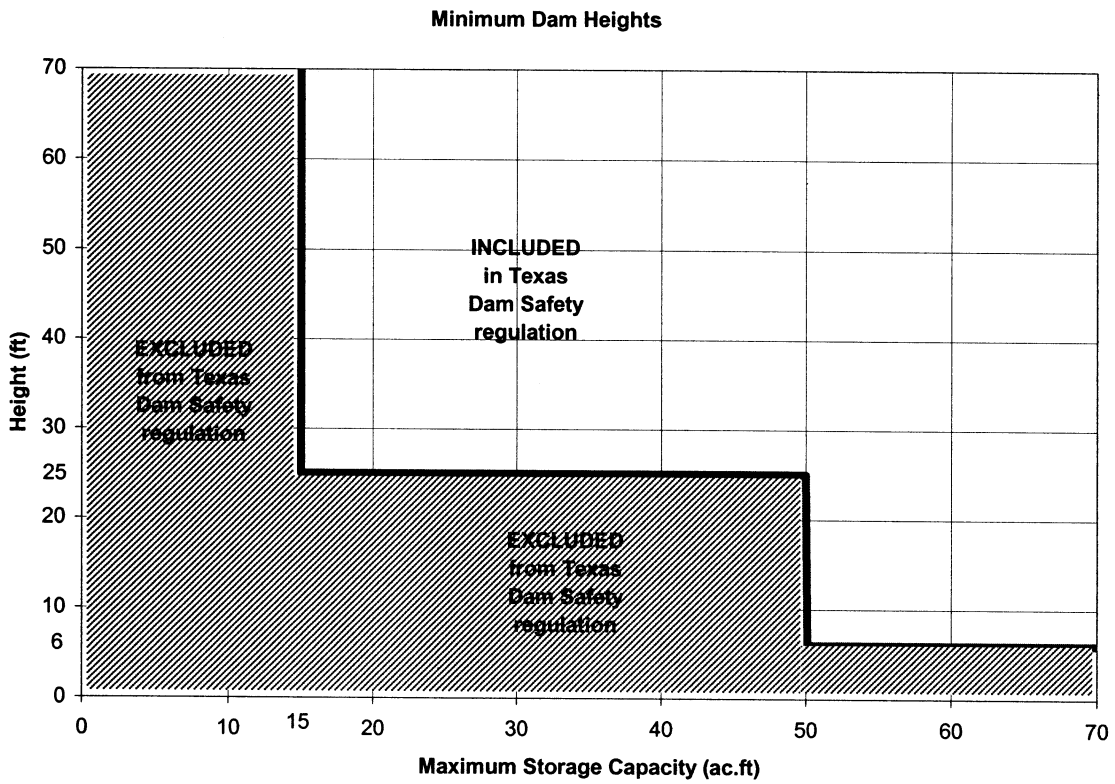


Figure: 30 TAC §299.13

SIZE CLASSIFICATION		
Category	Impoundment Maximum Storage (Acre-Foot)	Height (Ft.)
Small	Equal to or Greater than 15 and Less than 1,000 Equal to or Greater than 50 and Less than 1,000	Equal to or Greater than 25 and Less than 40 Greater than 6 & Less than 40
Intermediate	Equal to or Greater than 1,000 and Less than 50,000	Equal to or Greater than 40 and Less than 100
Large	Equal to or Greater than 50,000	Equal to or Greater than 100

Figure: 30 TAC §299.15(a)(1)(A)

HYDROLOGIC CRITERIA FOR DAMS		
Classification		
Hazard, as defined in §299.14 of this title (relating to Hazard Classification Criteria)	Size, as defined in §299.13 of this title (relating to Size Classification Criteria)	Minimum Design Flood Hydrograph (expressed as a percentage of the probable maximum flood (PMF)).
Low	Small	25% PMF
	Intermediate	25% PMF to 50% PMF
	Large	50% to 75% PMF
Significant	Small	50% PMF
	Intermediate	50% PMF to 75% PMF
	Large	75% to PMF
High	Small	75% PMF
	Intermediate	75% to PMF
	Large	PMF
When a range is given, the minimum flood hydrograph must be determined by straight-line interpolation within the given range. Interpolation must be based on either height of dam or maximum storage capacity, whichever results in the highest percentage of PMF. The interpolation for large, low-hazard dams for height must be between end points of 100 feet and 50% PMF and 200 feet and 75% PMF. The interpolation for large, low-hazard dams for maximum storage capacity must be between the end points of 50,000 acre-feet and 50% PMF and 300,000 acre-feet and 75% PMF. The interpolation for large, significant-hazard dams for height must be between end points of 100 feet and 75% PMF and 200 feet and PMF. The interpolation for large, significant-hazard for maximum storage capacity must be between the end points of 50,000 acre-feet and 75% PMF and 300,000 acre-feet and PMF.		

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, §16.011

Texas Alcoholic Beverage Code, §16.011, establishes an exception to the bar on the sale of alcoholic beverages in dry areas for wineries that sell or dispense wine that contains seventy five percent (75%), by volume, of Texas grown grapes or fruit. Texas Agriculture Code, §12.039, provides that the commissioner of agriculture may reduce the percentage by volume of fermented juice of grapes or other fruit grown in this state that wine containing that particular variety of grape or other fruit must contain under §16.011. The commissioner has received a report from the Texas Wine Marketing Research Institute, Texas Grape Production and Demand Report 2008 (Report), as provided for in §12.039, and upon review of that report has determined that, although data is limited, there is sufficient information to reduce the percentage of Texas grown grapes and fruit that is required by §16.011 to be in wine produced by wineries located in dry areas of Texas from seventy five percent (75%) to fifty percent (50%) for the 2009 calendar year. The exception to the statutory prohibition on alcohol sales in dry areas is lowered from the statutory seventy five percent (75%) to fifty percent (50%) based upon several factors, although data is limited. First, the Report indicates that statewide, thirty percent (30%) of wine produced in Texas is from Texas grapes. To maintain the intent of the statutory prohibition of dry area alcohol sales, combined with the limited exception enacted for wines meeting a high threshold of Texas grape content, the established level for dry area wineries should be higher than what is already being met by wineries statewide. Second, the level established in previous years was based in part on grape production factors limited by weather or natural causes. The Report indicates no such circumstance this year. Third, the survey conducted by the Report's authors indicates that only one dry area winery that responded was producing wine with less than fifty percent (50%) Texas grapes. As noted below, for limited situations like this, the Commissioner will review individual appeals for further reduction of the level set for calendar year 2009.

In accordance with §12.039(g), even after the commissioner's decision to reduce the percentage of Texas grown grapes and fruit that is required by §16.011 to fifty percent (50%), if a winery in a dry area of Texas finds that a particular variety of grape or other fruit is not available to a level sufficient for the winery to meet the winery's planned production for the relevant year, the winery may submit documentation or other information requested by the commissioner substantiating that the winery has not been able to acquire those grapes or other fruit grown in this state in an amount sufficient to meet the winery's production needs and to comply with requirements of §16.011. If the commissioner determines that there is not a sufficient quantity of that variety of grapes or other fruit grown in this state to meet the needs of that winery, the commissioner may further reduce the percentage requirement for wine bottled during the remainder of the calendar year that contains that variety of grape or fruit.

TRD-200806551
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: December 17, 2008

♦ ♦ ♦

Office of the Attorney General

Child Support Guidelines - 2009 Tax Charts

Pursuant to §154.061(b) of the Texas Family Code, the Office of the Attorney General of Texas, as the Title IV-D agency, has promulgated the following tax charts to assist courts in establishing the amount of a child support order. These tax charts are applicable to employed and self-employed persons in computing net monthly income.

INSTRUCTIONS FOR USE

To use these tables, first compute the obligor's annual gross income. Then recompute to determine the obligor's average monthly gross income. These tables provide a method for calculating "monthly net income" for child support purposes, subtracting from monthly gross income the social security taxes and the federal income tax withholding for a single person claiming one personal exemption and the standard deduction.

Thereafter, in many cases the guidelines call for a number of additional steps to complete the necessary calculations. For example, §§154.061 - 154.070 provide for appropriate additions to "income" as that term is defined for federal income tax purposes, and for certain subtractions from monthly net income, in order to arrive at the net resources of the obligor available for child support purposes. If necessary, one may compute an obligee's net resources using similar steps.

This agency hereby certifies that the tax charts have been reviewed by legal counsel and found to be within the agency's authority to publish.

EMPLOYED PERSONS
2009 TAX CHART

Monthly Gross Wages	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (6.2%)*	Social Security Taxes: Hospital (Medicare) Insurance Taxes (1.45%)*	Federal Income Taxes**	Net Monthly Income
$100.00	$6.20	$1.45	$0.00	$92.35
$200.00	$12.40	$2.90	$0.00	$184.70
$300.00	$18.60	$4.35	$0.00	$277.05
$400.00	$24.80	$5.80	$0.00	$369.40
$500.00	$31.00	$7.25	$0.00	$461.75
$600.00	$37.20	$8.70	$0.00	$554.10
$700.00	$43.40	$10.15	$0.00	$646.45
$800.00	$49.60	$11.60	$2.08	$736.72
$900.00	$55.80	$13.05	$12.08	$819.07
$1,000.00	$62.00	$14.50	$22.08	$901.42
$1,100.00	$68.20	$15.95	$32.08	$983.77
$1,135.33***	$70.39	$16.46	$35.62	$1,012.86
$1,200.00	$74.40	$17.40	$42.08	$1,066.12
$1,256.67****	$77.91	$18.22	$47.75	$1,112.79
$1,300.00	$80.60	$18.85	$52.08	$1,148.47
$1,400.00	$86.80	$20.30	$62.08	$1,230.82
$1,500.00	$93.00	$21.75	$73.33	$1,311.92
$1,600.00	$99.20	$23.20	$88.33	$1,389.27
$1,700.00	$105.40	$24.65	$103.33	$1,466.62
$1,800.00	$111.60	$26.10	$118.33	$1,543.97
$1,900.00	$117.80	$27.55	$133.33	$1,621.32
$2,000.00	$124.00	$29.00	$148.33	$1,698.67
$2,100.00	$130.20	$30.45	$163.33	$1,776.02
$2,200.00	$136.40	$31.90	$178.33	$1,853.37
$2,300.00	$142.60	$33.35	$193.33	$1,930.72
$2,400.00	$148.80	$34.80	$208.33	$2,008.07
$2,500.00	$155.00	$36.25	$223.33	$2,085.42
$2,600.00	$161.20	$37.70	$238.33	$2,162.77
$2,700.00	$167.40	$39.15	$253.33	$2,240.12
$2,800.00	$173.60	$40.60	$268.33	$2,317.47
$2,900.00	$179.80	$42.05	$283.33	$2,394.82
$3,000.00	$186.00	$43.50	$298.33	$2,472.17
$3,100.00	$192.20	$44.95	$313.33	$2,549.52
$3,200.00	$198.40	$46.40	$328.33	$2,626.87
$3,300.00	$204.60	$47.85	$343.33	$2,704.22
$3,400.00	$210.80	$49.30	$358.33	$2,781.57
$3,500.00	$217.00	$50.75	$373.33	$2,858.92
$3,600.00	$223.20	$52.20	$388.33	$2,936.27
$3,700.00	$229.40	$53.65	$412.50	$3,004.45
$3,800.00	$235.60	$55.10	$437.50	$3,071.80
$3,900.00	$241.80	$56.55	$462.50	$3,139.15
$4,000.00	$248.00	$58.00	$487.50	$3,206.50
$4,250.00	$263.50	$61.63	$550.00	$3,374.87
$4,500.00	$279.00	$65.25	$612.50	$3,543.25
$4,750.00	$294.50	$68.88	$675.00	$3,711.62
$5,000.00	$310.00	$72.50	$737.50	$3,880.00
$5,250.00	$325.50	$76.13	$800.00	$4,048.37
$5,500.00	$341.00	$79.75	$862.50	$4,216.75
$5,750.00	$356.50	$83.38	$925.00	$4,385.12
$6,000.00	$372.00	$87.00	$987.50	$4,553.50
$6,250.00	$387.50	$90.63	$1,050.00	$4,721.87
$6,500.00	$403.00	$94.25	$1,112.50	$4,890.25
$6,750.00	$418.50	$97.88	$1,175.00	$5,058.62
$7,000.00	$434.00	$101.50	$1,237.50	$5,227.00
$7,500.00	$465.00	$108.75	$1,362.50	$5,563.75
$8,000.00	$496.00	$116.00	$1,498.50	$5,889.50
$8,500.00	$527.00	$123.25	$1,638.50	$6,211.25
$9,000.00	$551.80*****	$130.50	$1,778.50	$6,539.20
$9,500.00	$551.80	$137.75	$1,918.50	$6,891.95
$10,000.00	$551.80	$145.00	$2,058.50	$7,244.70
$10,361.87******	$551.80	$150.25	$2,159.82	$7,500.00
$10,500.00	$551.80	$152.25	$2,198.50	$7,597.45
$11,000.00	$551.80	$159.50	$2,338.50	$7,950.20
$11,500.00	$551.80	$166.75	$2,478.50	$8,302.95
$12,000.00	$551.80	$174.00	$2,618.50	$8,655.70
$12,500.00	$551.80	$181.25	$2,758.50	$9,008.45
$13,000.00	$551.80	$188.50	$2,898.50	$9,361.20
$13,500.00	$551.80	$195.75	$3,038.50	$9,713.95
$14,000.00	$551.80	$203.00	$3,179.07	$10,066.13
$14,500.00	$551.80	$210.25	$3,320.20	$10,417.75
$15,000.00	$551.80	$217.50	$3,461.91	$10,768.79

Footnotes to Employed Persons 2009 Tax Chart:

* An employed person not subject to the Old-Age, Survivors and Disability Insurance/Hospital (Medicare) Insurance taxes will be allowed the reductions reflected in these columns, unless it is shown that such person has no similar contributory plan such as teacher retirement, federal railroad retirement, federal civil service retirement, etc.

** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,650.00, subject to reduction in certain cases, as described in the next paragraph of this footnote) and taking the standard deduction ($5,700.00).

For a single taxpayer with an adjusted gross income in excess of $166,800.00, the deduction for the personal exemption is reduced by one-third (1/3) of two percent (2%) for each $2,500.00 or fraction thereof by which adjusted gross income exceeds $166,800.00. The deduction for the personal exemption is no longer reduced for adjusted gross income in excess of $289,300.00. For example, monthly gross wages of $15,000.00 times 12 months equals $180,000.00. The excess over $166,800.00 is $13,200.00. $13,200.00 divided by $2,500.00 equals 5.28. The 5.28 amount is rounded up to 6. The reduction percentage is 4.0% (1/3 x 2% x 6 = 4.0%). The $3,650.00 deduction for one personal exemption is reduced by $146.00 ($3,650.00 x 4.0% = $146.00) to $3,504.00 ($3,650.00 - $146.00 = $3,504.00). For adjusted gross income in excess of $289,300.00 the deduction for the personal exemption is $2,433.33.

*** The amount represents one-twelfth (1/12) of the gross income of an individual earning the federal minimum wage from July 24, 2008 through July 23, 2009 ($6.55 per hour) for a 40-hour week for a full year. $6.55 per hour x 40 hours per week x 52 weeks per year equals $13,624.00 per year. One-twelfth (1/12) of $13,624.00 equals $1,135.33.

**** The amount represents one-twelfth (1/12) of the gross income of an individual earning the federal minimum wage after July 24, 2009 ($7.25 per hour) for a 40-hour week for a full year. $7.25 per hour x 40 hours per week x 52 weeks per year equals $15,080.00 per year. One-twelfth (1/12) of $15,080.00 equals $1,256.67.

***** For annual gross wages above $106,800.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2009 maximum Old-Age, Survivors and Disability Insurance tax of $6,621.60 per person (6.2% of the first $106,800.00 of annual gross wages equals $6,621.60). One-twelfth (1/12) of $6,621.60 equals $551.80.

******This amount represents the point where the monthly gross wages of an employed individual would result in $7,500.00 of net resources.

* *

References Relating to Employed Persons 2009 Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

   (a) Contribution Base

      (1) Social Security Administration's notice dated October 24, 2008, and appearing in 73 Fed. Reg. 64651 (October 30, 2008)

(2) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))

(3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

(b). Tax Rate

(1) Section 3101(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(a))

2. Hospital (Medicare) Insurance Tax

(a) Contribution Base

(1) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))

(2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

(b) Tax Rate

(1) Section 3101(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(b))

3. Federal Income Tax

(a) Tax Rate Schedule for 2009 for Single Taxpayers

(1) Revenue Procedure 2008-66, Section 3.01, Table 3 which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(2) Section 1(c), (f) and (i) of the Internal Revenue Code of 1986, as (26 U.S.C. § 1(c), 1(f), 1(i))

(b) Standard Deduction

(1) Revenue Procedure 2008-66, Section 3.10(1), which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

(c) Personal Exemption

(1) Revenue Procedure 2008-66, Section 3.19, which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

SELF-EMPLOYED PERSONS
2009 TAX CHART

Monthly Net Earnings From Self-Employment *	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (12.4%)**	Social Security Taxes: Hospital (Medicare) Insurance Taxes (2.9%)**	Federal Income Taxes***	Net Monthly Income
$100.00	$11.45	$2.68	$0.00	$85.87
$200.00	$22.90	$5.36	$0.00	$171.74
$300.00	$34.35	$8.03	$0.00	$257.62
$400.00	$45.81	$10.71	$0.00	$343.48
$500.00	$57.26	$13.39	$0.00	$429.35
$600.00	$68.71	$16.07	$0.00	$515.22
$700.00	$80.16	$18.75	$0.00	$601.09
$800.00	$91.61	$21.43	$0.00	$686.96
$900.00	$103.06	$24.10	$5.73	$767.11
$1,000.00	$114.51	$26.78	$15.02	$843.69
$1,100.00	$125.97	$29.46	$24.31	$920.26
$1,200.00	$137.42	$32.14	$33.61	$996.83
$1,300.00	$148.87	$34.82	$42.90	$1,073.41
$1,400.00	$160.32	$37.49	$52.19	$1,150.00
$1,500.00	$171.77	$40.17	$61.49	$1,226.57
$1,600.00	$183.22	$42.85	$71.38	$1,302.55
$1,700.00	$194.67	$45.53	$85.32	$1,374.48
$1,800.00	$206.13	$48.21	$99.26	$1,446.40
$1,900.00	$217.58	$50.88	$113.20	$1,518.34
$2,000.00	$229.03	$53.56	$127.14	$1,590.27
$2,100.00	$240.48	$56.24	$141.08	$1,662.20
$2,200.00	$251.93	$58.92	$155.02	$1,734.13
$2,300.00	$263.38	$61.60	$168.96	$1,806.06
$2,400.00	$274.83	$64.28	$182.90	$1,877.99
$2,500.00	$286.29	$66.95	$196.84	$1,949.92
$2,600.00	$297.74	$69.63	$210.78	$2,021.85
$2,700.00	$309.19	$72.31	$224.72	$2,093.78
$2,800.00	$320.64	$74.99	$238.66	$2,165.71
$2,900.00	$332.09	$77.67	$252.60	$2,237.64
$3,000.00	$343.54	$80.34	$266.54	$2,309.58
$3,100.00	$354.99	$83.02	$280.48	$2,381.51
$3,200.00	$366.44	$85.70	$294.42	$2,453.44
$3,300.00	$377.90	$88.38	$308.36	$2,525.36
$3,400.00	$389.35	$91.06	$322.30	$2,597.29
$3,500.00	$400.80	$93.74	$336.24	$2,669.22
$3,600.00	$412.25	$96.41	$350.18	$2,741.16
$3,700.00	$423.70	$99.09	$364.12	$2,813.09
$3,800.00	$435.15	$101.77	$378.06	$2,885.02
$3,900.00	$446.60	$104.45	$393.62	$2,955.33
$4,000.00	$458.06	$107.13	$416.85	$3,017.96
$4,250.00	$486.68	$113.82	$474.94	$3,174.56
$4,500.00	$515.31	$120.52	$533.02	$3,331.15
$4,750.00	$543.94	$127.21	$591.11	$3,487.74
$5,000.00	$572.57	$133.91	$649.19	$3,644.33
$5,250.00	$601.20	$140.60	$707.28	$3,800.92
$5,500.00	$629.83	$147.30	$765.36	$3,957.51
$5,750.00	$658.46	$153.99	$823.44	$4,114.11
$6,000.00	$687.08	$160.69	$881.53	$4,270.70
$6,250.00	$715.71	$167.38	$939.61	$4,427.30
$6,500.00	$744.34	$174.08	$997.70	$4,583.88
$6,750.00	$772.97	$180.78	$1,055.78	$4,740.47
$7,000.00	$801.60	$187.47	$1,113.87	$4,897.06
$7,500.00	$858.86	$200.86	$1,230.04	$5,210.24
$8,000.00	$916.11	$214.25	$1,346.21	$5,523.43
$8,500.00	$973.37	$227.64	$1,470.36	$5,828.63
$9,000.00	$1,030.63	$241.03	$1,600.47	$6,127.87
$9,500.00	$1,087.88	$254.42	$1,730.58	$6,427.12
$10,000.00	$1,103.60****	$267.82	$1,866.50	$6,762.08
$10,500.00	$1,103.60	$281.21	$2,004.63	$7,110.66
$11,000.00	$1,103.60	$294.60	$2,142.75	$7,459.05
$11,058.76*****	$1,103.60	$296.17	$2,158.99	$7,500.00
$11,500.00	$1,103.60	$307.99	$2,280.88	$7,807.53
$12,000.00	$1,103.60	$321.38	$2,419.00	$8,156.02
$12,500.00	$1,103.60	$334.77	$2,557.13	$8,504.50
$13,000.00	$1,103.60	$348.16	$2,695.25	$8,852.99
$13,500.00	$1,103.60	$361.55	$2,833.38	$9,201.47
$14,000.00	$1,103.60	$374.94	$2,971.50	$9,549.96
$14,500.00	$1,103.60	$388.33	$3,109.63	$9,898.44
$15,000.00	$1,103.60	$401.72	$3,248.89	$10,245.79

Footnotes to Self-Employed Persons 2009 Tax Chart:

* Determined without regard to Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12)) (the "Code").

** In calculating each of the Old-Age, Survivors and Disability Insurance tax and the Hospital (Medicare) Insurance tax, net earnings from self-employment are reduced by the deduction under Section 1402(a)(12) of the Code. The deduction under Section 1402(a)(12) of the Code is equal to net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) multiplied by one-half (1/2) of the sum of the Old-Age, Survivors and Disability Insurance tax rate (12.4%) and the Hospital (Medicare) Insurance tax rate (2.9%). The sum of these rates is 15.3% (12.4% + 2.9% = 15.3%). One-half (1/2) of the combined rate is 7.65% (15.3% x 1/2 = 7.65%). The deduction can be computed by multiplying the net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) by 92.35%. This gives the same deduction as multiplying the net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) by 7.65% and then subtracting the result.

For example, the Social Security taxes imposed on monthly net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) of $2,500.00 are calculated as follows:

(i) Old-Age, Survivors and Disability Insurance Taxes:

$2,500.00 x 92.35% x 12.4% = $286.29

(ii) Hospital (Medicare) Insurance Taxes:

$2,500.00 x 92.35% x 2.9% = $66.95

*** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,650.00, subject to reduction in certain cases, as described below in this footnote) and taking the standard deduction ($5,700.00).

In calculating the annual federal income tax, gross income is reduced by the deduction under Section 164(f) of the Code. The deduction under Section 164(f) of the Code is equal to one-half (1/2) of the self-employment taxes imposed by Section 1401 of the Code for the taxable year. For example, monthly net earnings from self-employment of $15,000.00 times 12 months equals $180,000.00. The Old-Age, Survivors and Disability Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $13,243.20 ($106,800.00 x 12.4% = $13,243.20). The Hospital (Medicare) Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $4,820.67 ($180,000.00 x .9235 x 2.9% = $4,820.67). The sum of the taxes imposed by Section 1401 of the Code for the taxable year equals $18,063.87 ($13,243.20 + $4,820.67 = $18,063.87). The deduction under Section 164(f) of the Code is equal to one-half (1/2) of $18,063.87 or $9,031.94.

For a single taxpayer with an adjusted gross income in excess of $166,800.00, the deduction for the personal exemption is reduced by one-third (1/3) of two percent (2%) for each $2,500.00 or fraction thereof by which adjusted gross income exceeds $166,800.00. The deduction for the personal exemption is no longer reduced for adjusted

gross income in excess of $289,300.00. For example, monthly net earnings from self-employment of $15,000.00 times 12 months equals $180,000.00. The $180,000.00 amount is reduced by $9,031.94 (i.e., the deduction under Section 164(f) of the Code -- see the immediately preceding paragraph of this footnote for the computation) to arrive at adjusted gross income of $170,968.06. The excess over $166,800.00 is $4,168.06. $4,168.06 divided by $2,500.00 equals 1.67. The 1.67 amount is rounded up to 2. The reduction percentage is 1.33% (1/3 x 2% x 2 = 1.33%). The $3,650.00 deduction for one personal exemption is reduced by $48.55 ($3,650.00 x 1.33% = $48.55) to $3,601.45 ($3,650.00 - $48.55 = $3,601.45). For adjusted gross income in excess of $289,300.00 the deduction for the personal exemption is $2,433.33.

**** For annual net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) above $106,800.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2009 maximum Old-Age, Survivors and Disability Insurance tax of $13,243.20 per person (12.4% of the first $106,800.00 of net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) equals $13,243.20). One-twelfth (1/12) of $13,243.20 equals $1,103.60.

***** This amount represents the point where the monthly net earnings from self-employment of a self-employed individual would result in $7,500.00 of net resources.

* *

References Relating to Self-Employed Persons 2009 Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

   (a) Contribution Base

      (1) Social Security Administration's notice dated October 24, 2008, and appearing in 73 Fed. Reg. 64651 (October 30, 2008)

      (2) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))

      (3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

   (b) Tax Rate

      (1) Section 1401(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(a))

   (c) Deduction Under Section 1402(a)(12)

      (1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))

2. Hospital (Medicare) Insurance Tax

   (a) Contribution Base

(1) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))

(2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

(b) Tax Rate

(1) Section 1401(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(b))

(c) Deduction Under Section 1402(a)(12)

(1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))

3. Federal Income Tax

(a) Tax Rate Schedule for 2009 for Single Taxpayers

(1) Revenue Procedure 2008-66, Section 3.01, Table 3 which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(2) Section 1(c), (f) and (i) of the Internal Revenue Code of 1986, as (26 U.S.C. § 1(c), 1(f), 1(i))

(b) Standard Deduction

(1) Revenue Procedure 2008-66, Section 3.10(1), which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(1) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

(c) Personal Exemption

(1) Revenue Procedure 2008-66, Section 3.19, which appears in Internal Revenue Bulletin 2008-45, dated November 10, 2008

(2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

(d) Deduction Under Section 164(f)

(1) Section 164(f) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 164(f))

TRD-200806463
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 12, 2008

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/15/08 - 12/21/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/15/08 - 12/21/08 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200806482
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 12, 2008

♦ ♦ ♦

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/22/08 - 12/28/08 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/22/08 - 12/28/08 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/09 - 01/31/09 is 5.00% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 01/01/09 - 01/31/09 is 5.00% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment, or other similar purpose.

TRD-200806532
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 16, 2008

♦ ♦ ♦

Credit Union Department

Application to Expand Field of Membership

Notice is given that the following application have been filed with the Credit Union Department and are under consideration:

An application was received from First Service Credit Union, Houston, Texas to expand its field of membership. The proposal would permit employees of Carrizo Oil & Gas, Inc. who work in or are paid from Houston, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200806542
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 17, 2008

♦ ♦ ♦

Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership--Approved

Texas Dow Employees Credit Union, Lake Jackson, Texas (#3) (Amended)--Persons who live, work, worship, or attend school in, and businesses and other legal entities located within a 10-mile radius of the branch office located at 2800 Texas Avenue, Texas City, Texas.

Texas Dow Employees Credit Union, Lake Jackson, Texas (#4) (Amended)--Persons who live, work, worship, or attend school in, and businesses and other legal entities located within a 10-mile radius of the branch office located at 10952 Westheimer Road, Houston, Texas.

Cooperative Teachers Credit Union, Tyler, Texas--See *Texas Register* issue dated September 26, 2008.

Abilene State School Credit Union, Abilene, Texas--See *Texas Register* issue dated October 31, 2008.

Application to Expand Field of Membership--Denied

Associated Credit Union of Texas, Texas City, Texas--See *Texas Register* issue dated September 26, 2008.

TRD-200806543
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 17, 2008

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an op-

portunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 26, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 26, 2009.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Altivia Corporation; DOCKET NUMBER: 2008-1442-IWD-E; IDENTIFIER: RN102076601; LOCATION: Harris County; TYPE OF FACILITY: chemical manufacturing plant with a wastewater treatment system; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.65 and §305.125(2) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharge of wastewater; PENALTY: $5,350; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Armstrong Mechnical Company Inc.; DOCKET NUMBER: 2008-1847-PST-E; IDENTIFIER: RN101757169; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(3) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2008-0921-AIR-E; IDENTIFIER: RN103919817; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(c), Permit Numbers 37063 and 46305, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $15,850; Supplemental Environmental Project (SEP) offset amount of $6,340 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: ExxonMobil Oil Corporation; DOCKET NUMBER: 2008-1230-AIR-E; IDENTIFIER: RN102450756; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Federal Operating Permit (FOP) Number O-02048, SC Number 11, Air Permit Number 19566/PSD-TX-768M1 and PSD-TX-932, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $4,000 applied to Jefferson County: Retrofit/Replacement of Heavy Equipment and Vehicles with Alternative Fueled Equipment and Vehicles; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Favelle Favco Cranes USA, Inc.; DOCKET NUMBER: 2008-1300-MLM-E; IDENTIFIER: RN102952983; LOCATION: Harlingen, Cameron County; TYPE OF FACILITY: crane component manufacturing plant; RULE VIOLATED: 30 TAC §106.433(6)(A), New Source Review Permit by Rule Registration (NSRPBRR) Number 72677, and THSC, §382.085(b), by failing to comply with the paint booth's pounds per hour emissions limit; 30 TAC §106.8(c)(2)(B) and THSC, §382.085(b), by failing to maintain sufficient records to demonstrate compliance with the NSRPBRR; 30 TAC §106.433(6)(C), NSRPBRR Number 72677, and THSC, §382.085(b), by failing to use a filter with a manufacturer-documented minimal 95% removal efficiency to abate emissions from paint spraying operations; 30 TAC §281.25(a)(4), Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR05W625, Part III.A.1.(a), by failing to have a storm water pollution prevent plan onsite and readily available for review; 30 TAC §281.25(a)(4) and TPDES General Permit Number TXR05W625, Part III.A.5.(b)(3), by failing to clearly label drums, tanks, or other containers; and 30 TAC §281.25(a)(4) and TPDES General Permit Number TXR05W625, Part III.A.5.(b)(6), by failing to make materials and equipment necessary for spill clean up available to personnel; PENALTY: $4,128; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5925; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: Flint Hills Resources, LP; DOCKET NUMBER: 2008-1269-AIR-E; IDENTIFIER: RN100217389; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), Air Permit Number 16989/PSD-TX-794, SC Number 1, FOP Number O-01317, General Terms and Conditions (GTC) and SC Number 16, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $7,025; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: City of Fort Worth; DOCKET NUMBER: 2008-1224-WQ-E; IDENTIFIER: RN101424687; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: public water system; RULE VIOLATED: the Code, §26.121(a), by failing to prevent the unauthorized discharge of a pollutant into or adjacent to water in the state; and 30 TAC §327.3(b) and the Code, §26.039(b), by failing to provide notification to the TCEQ of an unauthorized discharge; PENALTY: $8,400; SEP offset amount of $8,400 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Grand Texas Homes Inc.; DOCKET NUMBER: 2008-1854-WQ-E; IDENTIFIER: RN105634620; LOCATION: Fairview, Collin County; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: City of Hallsville; DOCKET NUMBER: 2008-1420-MWD-E; IDENTIFIER: RN102181872; LOCATION: Harrison County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and TPDES Permit Number

WQ0010460001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permit effluent limits for ammonia-nitrogen; PENALTY: $4,780; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: Honeywell International Inc.; DOCKET NUMBER: 2008-1283-AIR-E; IDENTIFIER: RN100217405; LOCATION: Orange, Orange County; TYPE OF FACILITY: polyethylene production plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), Air Operating Permit Number O-01533, Special Terms and Conditions (STC) Number 13, NSR Permit Number 1829, General Condition Number 8, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $2,700; SEP offset amount of $1,080 applied to Texas Parent Teacher Association (PTA) - *Clean School Bus Program;* ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(11) COMPANY: INEOS USA LLC; DOCKET NUMBER: 2008-1561-AIR-E; IDENTIFIER: RN100238708; LOCATION: Alvin, Brazoria County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Air Permit Number 95, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $9,250; ENFORCEMENT COORDINATOR: Jeremy Escobar, (512) 239-1460; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Lamb County Hospital dba Lamb Healthcare Center; DOCKET NUMBER: 2008-1846-PST-E; IDENTIFIER: RN101839488; LOCATION: Littlefield, Lamb County; TYPE OF FACILITY: medical and surgical hospital; RULE VIOLATED: 30 TAC §334.8(c), by failing to submit initial/renewal underground storage tank (UST) registration and self-certification form; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(13) COMPANY: PD Glycol LP; DOCKET NUMBER: 2008-1180-AIR-E; IDENTIFIER: RN100825413; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 8639A, SC Number 3(A), and THSC, §382.085(b), by failing to prevent the release of unauthorized contaminants into the atmosphere; PENALTY: $5,875; SEP offset amount of $2,350 applied to Jefferson County-Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: PROTON REALTY COMPANY dba C Store 104; DOCKET NUMBER: 2008-1523-PST-E; IDENTIFIER: RN102028792; LOCATION: Addison, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §115.242(3)(I) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $5,103; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Roy Silva dba Roy's Chevron; DOCKET NUMBER: 2008-0657-PST-E; IDENTIFIER: RN101806891; LOCATION: Junction, Kimble County; TYPE OF FACILITY: repair center with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain copies of all the required records pertaining to the UST system; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.49(c)(4) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to conduct daily inventory volume measurements; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: $9,746; ENFORCEMENT COORDINATOR: Steve Lopez, (512) 239-1896; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(16) COMPANY: Total Petrochemicals USA, Inc.; DOCKET NUMBER: 2008-0989-AIR-E; IDENTIFIER: RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: crude oil refinery plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01267, NSR Permit Number 2347 STC Number 27, and THSC, §382.085(b), by failing to comply with permitted nitrogen oxides and particulate matter emission limits; 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 54026, SC Number 5D, FOP Number O-01267, STC Number 27, and THSC, §382.085(b), by failing to install analyzers which provide a record of the vent stream flow and composition on three flares; 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 56385, SC Number 3, FOP Number O-01267, STC Number 27, and THSC, §382.085(b), by failing to maintain the food-to-microorganisms ratio; and 30 TAC §§101.20(3), 116.115(b), and 122.143(4), NSR Permit Number 18936, GC Number 8, FOP Number O-01267, STC Number 27, and THSC, §382.085(b), by failing to maintain allowable emission rates; PENALTY: $51,150; SEP offset amount of $13,210 applied to PTA - *Clean School Bus Program;* SEP offset amount of $7,500 applied to City of Port Arthur - *Purchase of Natural Gas Generators;* ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(17) COMPANY: UTLX Manufacturing, Inc.; DOCKET NUMBER: 2008-1324-AIR-E; IDENTIFIER: RN100212828; LOCATION: Houston, Harris County; TYPE OF FACILITY: railcar manufacturing and painting plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(C), FOP Number O-01729, GTC, and THSC, §382.085(b), by failing to submit a Title V deviation report; PENALTY: $1,975; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: Francisco J. Vasquez; DOCKET NUMBER: 2008-1843-OSI-E; IDENTIFIER: RN104912860; LOCATION: Ozona, Crockett County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(19) COMPANY: Ofelia Bosquez dba Wenchos Gas & Food Mart; DOCKET NUMBER: 2008-1251-AIR-E; IDENTIFIER:

RN101652691; LOCATION: Tornillo, El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the seven pounds per square inch absolute maximum Reid vapor pressure requirement for gasoline transferred; PENALTY: $1,420; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 410 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

TRD-200806518
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 16, 2008

♦ ♦ ♦

Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 26, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 26, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: BASF Corporation; DOCKET NUMBER: 2007-1508-AIR-E; TCEQ ID NUMBER: RN100218049; LOCATION: 602 Copper Road, Freeport, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c), Permit Number 8074A, Special Condition Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to control unauthorized emissions from the OXO Flare, FL-200, on May 2, 2007; and 30 TAC §101.201(b) and THSC, §382.085(b), by failing to submit timely final notification for the May 2, 2007, event; PENALTY: $5,642; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Chez-Salin Quality Cleaners, Inc. dba Rodeo Cleaners 1, dba Rodeo Cleaners 2, dba Rodeo Cleaners 3, and dba Lyric South Cleaners; DOCKET NUMBER: 2006-0708-DCL-E; TCEQ ID NUMBER: RN104087390, RN104087473, RN104087416, and RN102150364; LOCATION: 5414 West Military Drive, San Antonio, Bexar County (Lyric South Cleaners), 633 South WW White Road, San Antonio, Bexar County (Rodeo Cleaners 1), 4707 Pecan Valley Drive, San Antonio, Bexar County (Rodeo Cleaners 2), 2606 Pleasanton Road, San Antonio, Bexar County (Rodeo Cleaners 3); TYPE OF FACILITY: dry cleaning facility (Lyric South Cleaners), dry cleaning drop stations (Rodeo Cleaners 1, Rodeo Cleaners 2, Rodeo Cleaners 3); RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102(a), by failing to complete and submit the required registration forms to TCEQ for a dry cleaning facility and three drop stations; PENALTY: $4,704; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: ICI Construction, Inc.; DOCKET NUMBER: 2007-1146-WQ-E; TCEQ ID NUMBER: RN105171698; LOCATION: the Hamptons at Pine Forest, 4250 Old Omen Road, Tyler, Smith County; TYPE OF FACILITY: planned multi-family residence construction site; RULES VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System(TPDES) permit number TXR15FB14, Part III, Section F.2(a)(i) and (ii), by failing to design and maintain in effective operating condition all sediment control measures, resulting in an unauthorized discharge; and 30 TAC §305.125(1) and TPDES permit number TXR15FB14, Part III, Section F.2(a)(iii), by failing to remove sediment from a sedimentation pond no later than the time that design capacity has been reduced by 50%; PENALTY: $17,000; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: King Ranch, Inc.; DOCKET NUMBER: 2008-0756-AIR-E; TCEQ ID NUMBER: RN101718740; LOCATION: west of Highway 141 and seven miles west of Kingsville, Kleberg County; TYPE OF FACILITY: cattle ranching operation; RULES VIOLATED: THSC, §382.085(b) and 30 TAC §§101.5, 111.201, and 111.219(4) and (6)(A), by failing to prevent a discharge of air contaminants which cause or have a tendency to cause a traffic hazard, by failing to post flag-persons on affected roads, and by failing to complete a burn on the same day not later than one hour before sunset; and THSC, §382.085(b) and 30 TAC §111.201 and §111.219(6)(A), by failing to complete a burn on the same day not later than one hour before sunset; PENALTY: $3,570; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

TRD-200806528
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 16, 2008

♦ ♦ ♦

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and

petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 26, 2009**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 26, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Michael L. O'Neill dba Frontier Park Marina; DOCKET NUMBER: 2008-1103-PWS-E; TCEQ ID NUMBER: RN101183986; LOCATION: east of Milam, Sabine County Texas on Highway 21 with an address of Rural Route 1, Box 1690, Hemphill; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1, of each year and by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the water system and that the information in the CCR is correct and consistent with compliance monitoring data provided to the TCEQ by July 1 of each year; PENALTY: $716; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Prince Texas Group, Inc.; DOCKET NUMBER: 2007-0084-PST-E; TCEQ ID NUMBER: RN102409851; LOCATION: 1202 Magnolia Avenue, Port Neches, Jefferson County; TYPE OF FACILITY: abandoned convenience store with underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(d)(2), by failing to either permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements, or to ensure that any residue from stored regulated substances which remain in a temporarily out-of-service UST shall not exceed 2.5 centimeters at the deepest point and shall not exceed 0.3% by weight of the system at full capacity; and 30 TAC §334.54(b), by failing to assure that, with the exception of vent lines, all piping, pumps, manways, and ancillary equipment shall be capped, plugged, locked, and/or otherwise secured to prevent access, tampering, or vandalism by unauthorized persons; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; PENALTY: $11,050; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-200806529
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 16, 2008

♦ ♦ ♦

Notice of the Executive Director's Response to Public Comment on Texas Commission on Environmental Quality General Permit Number TXG500000

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment (Response) on Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXG500000, for quarries located greater than one mile from a water body within a water quality protection area in the John Graves Scenic Riverway. Prior to issuing a general permit, the executive director must comply with the provisions in Texas Water Code (TWC), §26.040(d) and 30 Texas Administrative Code (TAC) §205.3(e). Both provisions require the executive director to prepare a response to all timely, relevant and material, or significant public comments received. The executive director must make these responses publicly available and must file them with the commission's Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit.

The Office of the Chief Clerk received timely public comments from one individual. This Response addresses the comment received. If you need more information about this general permit or the general wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. General information about the TCEQ can be found on our website at *www.tceq.state.tx.us*.

BACKGROUND

Regulatory Background

Senate Bill (SB) 1354, 79th Legislature, 2005, Regular Session, effective June 17, 2005, enacted TWC, Chapter 26, Subchapter M, Water Quality Protection Areas addressing permitting, financial responsibility, inspections, water quality sampling, enforcement, cost recovery, and interagency cooperation with regard to quarry operations within a water quality protection area in the John Graves Scenic Riverway. TWC, Chapter 26, Subchapter M also required rulemaking by the TCEQ, which was completed and effective August 3, 2006, in 30 TAC Chapter 311 (Watershed Protection), Subchapter H and Chapter 37 (Financial Assurance), Subchapter W. The legislation, statute, and rules all require quarries located one mile or greater from a water body in the John Graves Scenic Riverway to obtain authorization under a general permit, TPDES General Permit Number TXG500000.

This general permit is issued under the statutory authority of the TWC as follows: (1) TWC, §26.121, which makes it unlawful to discharge pollutants into or adjacent to water in the state except as authorized by a rule, permit, or order issued by the commission; (2) TWC, §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state, (3) TWC, §26.040, which provides the commission with

authority to amend rules to authorize waste discharges by general permit, and (4) TWC, §26.533, which requires quarries located within the water quality protection area of the John Graves Scenic Riverway and located more than one mile from a water body to obtain authorization under a general permit.

Introduction

General Permit Number TXG500000 would authorize the discharges of process wastewater, mine dewatering, storm water associated with industrial activity, construction storm water, and certain non-storm water discharges from quarries located greater than one mile from a water body that is within a water quality protection area in the John Graves Scenic Riverway. Facilities applying for authorization under this general permit are required to submit a Notice of Intent (NOI), Pollution Prevention Plan, Restoration Plan, and proof of financial assurance for Restoration to obtain authorization for discharge. The general permit authorizes discharges for five years from the effective date of the permit.

Procedural Background

The Office of the Chief Clerk received the permit file on August 8, 2008. Notice of availability and an announcement of the public meeting for this permit were published in the *Weatherford Democrat* and *Mineral Wells Index* on August 17, 2008. Notice of availability and an announcement of the public meeting for this permit were also published in the *Dallas Morning News* and the *Fort Worth Star-Telegram* on August 18, 2008 and in the *Texas Register* on August 22, 2008. Mailed notice was also provided in accordance with 30 TAC §205.3(b). A public meeting was held in Weatherford, Texas on September 23, 2008, and the comment period ended at the close of the public meeting.

COMMENT AND RESPONSE

COMMENT: One individual commented on the requirements of the Comprehensive Site Compliance Inspection/Evaluation. The general permit requires a Texas licensed professional engineer or Texas licensed professional geoscientist to conduct the comprehensive compliance inspection/evaluation. This individual suggested that it would be satisfactory to allow a qualified professional to conduct the comprehensive compliance inspection/evaluation and have it certified by the licensed professional.

RESPONSE: The executive director reviewed the comment and still believes that the Comprehensive Site Compliance Inspection/Evaluation should be conducted by a Texas licensed professional engineer or Texas licensed professional geoscientist. However, the executive director modified the requirement such that the Comprehensive Site Compliance Inspection/Evaluation is only required once per year.

CHANGES MADE TO THE DRAFT PERMIT IN RESPONSE TO COMMENT

CHANGE NUMBER 1: Part V.E.3.(a) of the general permit was changed to read as follows:

3. Comprehensive Site Compliance Evaluation

a. A Texas licensed professional engineer or Texas licensed professional geoscientist shall conduct a comprehensive site compliance inspection/evaluation at an interval that is defined in the P3, but on a yearly basis at a minimum. The evaluation must include the following:

i. A complete review of the P3 to determine compliance with inspection, record keeping, and other requirements established in this general permit;

ii. A review of all discharge monitoring data to determine compliance with effluent limitations established in the general permit;

iii. A determination of the remaining capacity of the sedimentation pond(s);

iv. An evaluation of the conditions of the runoff control berms;

v. A visual observation of the discharge outfall(s) and an assessment of the discharge route to determine if significant quantities of sediment have been released from the quarry;

vi. An assessment of temporary and/or permanent stabilization efforts at the quarry; and

vii. A review of restoration activities conducted in receiving waters, if applicable.

TRD-200806519
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 16, 2008

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of December 4, 2008 through December 16, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

BASF CORPORATION which operates an agriculture chemical (herbicides and insecticides) manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0001169000 to authorize a change in the waste stream authorized at Outfalls 001 and 002 to storm water from non-process areas, river water treatment backwash, uncontaminated hydrostatic test waters, uncontaminated steam condensate, potable line flushing water, other uncontaminated utility waters, and treated domestic wastewater; Outfall 003 to storm water from non-process areas, river water treatment backwash, uncontaminated hydrostatic test waters, uncontaminated steam condensate, potable line flushing, other uncontaminated utility waters, drainage from experimental rice fields and treated domestic wastewater; removal of effluent limits for Carbonaceous Biochemical Oxygen Demand (5-day), Ammonia-N, dissolved oxygen, Banvel (Dicamba) and 2,4-Dichlorophenoxyacetate acid) from the permit; and removal of biomonitoring requirements at Outfall 001. The current permit authorizes the discharge of river water treatment backwash commingled with storm water runoff, and treated domestic sewage at a daily average flow not to exceed 1,200,000 gallons per day via Outfall 001; storm water runoff on an intermittent and flow variable basis via Outfall 002; and stormwater runoff on an intermittent and flow variable basis via Outfall 003. The facility is located approximately two miles northwest of the Jefferson County Airport, on the west side of West Port Arthur Road, approximately five miles south of Cardinal Drive in the City of Beaumont, Jefferson County, Texas.

CITY OF ABBOTT has applied for a renewal of TPDES Permit No. WQ0011544001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located 0.5 mile south of Farm-to-Market Road 1242 and 1.1 miles east of Interstate Highway 35 in the City of Abbott in Hill County, Texas.

CITY OF BRYAN which operates the Roland C. Dansby Steam Electric Station, a natural gas fired power plant, has applied for a renewal of TPDES Permit No. WQ0002117000, which authorizes the discharge of cooling tower blowdown, low volume waste, and storm water on an intermittent and flow variable basis via Outfall 001; low volume waste, storm water, and previously monitored effluent from the roof drain system on an intermittent and flow variable basis via Outfall 002; treated sewage effluent at a daily average flow not to exceed 3,000 gallons per day via internal Outfall 102; and once through cooling water at a daily average flow not to exceed 78,000,000 via Outfall 003. The facility is located south of Mumford Road, approximately 1.5 miles east of the intersection of Mumford Road and West OSR, and approximately 5.0 miles northwest of the City of Bryan, Brazos County, Texas.

CITY OF GATESVILLE has applied for a renewal of Permit No. WQ0004464000, which authorizes the land application of sewage sludge and water treatment plant sludge for beneficial use. The current permit authorizes land application of sewage sludge and water treatment plant sludge for beneficial use on 25 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located on the Gatesville Airport property, approximately one mile southwest of the intersection of State Highway 116 and U.S. Highway 84 in Coryell County, Texas.

CITY OF GEORGETOWN has applied to the TCEQ for a renewal of TPDES Permit No. WQ0010489005, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility is located approximately 1.8 miles west of the Town of Weir and 4.2 miles northeast of the intersection of Business Interstate Highway 35 (North Austin Avenue) and Farm-to-Market Road 971 in Williamson County, Texas.

CITY OF MOUNT PLEASANT has applied for a renewal of TPDES Permit No. WQ0010575004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,910,000 gallons per day. The application also includes a request for the continuation of a temporary variance to the existing water quality standards for copper. The variance would authorize a three-year period in which to conduct a water quality study of the unnamed tributary where it joins Hart Creek, in Segment No. 0404 of the Cypress Creek Basin into which the treated domestic wastewater is discharged. The study would show whether a site-specific amendment to water quality standards is justified. Prior to the expiration of the three-year variance period, the Commission will consider the site-specific standards and determine whether to adopt the standards or require the existing water quality standards to remain in effect. The facility is located approximately 5,000 feet east of U.S. Highway 271 and approximately 11,000 feet north of the crossing of U.S. Highway 271 and Big Cypress Creek in Titus County, Texas.

CITY OF ROARING SPRINGS has applied for a renewal of Permit No. WQ0010260001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day via surface irrigation of 22 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located adjacent to the east side of State Highway 70, approximately 500 feet south of the SLSFT Railroad tracks and approximately 3,600 feet north of the intersection of State Highway 70 and Farm-to-Market Road 684 in Motley County, Texas.

ESTATE OF ANN SLEMONS YOUNG has applied for a renewal of TPDES Permit No. WQ0012450001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 65,000 gallons per day. The facility is located at 14003 West Hardy Road, approximately one mile south of Aldine-Bender Road in the City of Houston in Harris County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 118 has applied for a major amendment to TPDES Permit No. WQ0013951001 to authorize an additional interim phase discharge of treated domestic wastewater not to exceed a daily flow of 750,000 gallons per day and a revision of the buffer zone requirement. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is currently operating in the 600,000 gallons per day phase. The facility is located 4,200 feet west of Harlem Road and 7,200 feet south of Mortin Road in Fort Bend County, Texas.

GARY WAYNE WATSON AND JUAN SANCHEZ has applied for a renewal of, and conversion to an individual permit, Texas Pollutant Discharge Elimination System (TPDES) Registration No. WQ0004282000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing dairy cattle facility at a maximum capacity of 700 head of which all are milking cows. The facility is located on the south side of Farm-to-Market Road 3025, approximately 0.75 mile west of the intersection of Farm-to-Market Road 3025 and Farm-to-Market Road 108 in Erath County, Texas.

HALLIBURTON ENERGY SERVICES INC has applied for a renewal of TPDES Permit No. WQ0014113001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,500 gallons per day. The facility is located at 1800 Seawolf Parkway, Pelican Island, Galveston, approximately 1.7 miles along the Seawolf Parkway from the bridge, then south 1,800 feet in Galveston County, Texas.

KENDALL COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 2 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014906001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility will be located approximately 0.85 mile northwest of the intersection of Ammann Road and State Highway 46, approximately 0.70 mile north of State Highway 46 along Browns Creek in Kendall County, Texas.

SANDERSON FARMS INC (Processing Division), which operates the Sanderson Farms Brazos Processing Division Plant, a poultry processing plant, has applied for a renewal of TPDES Permit No. WQ0003821000, which authorizes the discharge of treated process wastewater, domestic wastewater, utility wastewater, storm water, and truck wash water at a daily average flow not to exceed 1,678,000 gallons per day via Outfall 001. The facility is located at 2000 Shiloh Drive, approximately 1.6 miles southwest of the intersection of State Highway 21 and Farm-to-Market Road 2818 in the City of Bryan, Brazos County, Texas.

SOLUTIA INC AND EQUISTAR CHEMICALS LP which operates the Chocolate Bayou Plant, an industrial chemical plant manufacturing organic specialty chemicals, has applied for a renewal of TPDES Permit No. WQ0000001000, which authorizes the discharge of previously monitored process wastewater, domestic sewage (via Outfall 101), domestic sewage, utility wastewaters, storm water, after-first-flush storm water, hydrostatic test waters, and infiltration of groundwater at a daily average flow not to exceed 7,800,000 gallons per day via Outfall 001; storm water, utility wastewater, hydrostatic test waters and infiltration of groundwater on an intermittent and flow variable basis via Outfall 002; storm water, utility wastewater, hydrostatic test waters and infiltration of groundwater on an intermittent and flow variable basis via Outfall 003; storm water from hazardous injection well sites on an intermittent and flow variable basis via Outfall 004; storm water from hazardous injection well site on an intermittent and flow variable basis via Outfall 005; storm water from the hazardous waste landfill on an

intermittent and flow variable basis via Outfall 006; and storm water from hazardous waste landfill site on an intermittent and flow variable basis via Outfall 007. The facility is located adjacent to Farm-to-Market Road 2917, approximately 1.25 miles northwest of the intersection of Farm-to-Market Road 2917 and Farm-to-Market Road 2004, and south-southeast of the City of Alvin, Brazoria County, Texas.

SYED N. HYDER has applied for a renewal of TPDES Permit No. WQ0011778001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 45,000 gallons per day. The facility is located approximately 2.5 miles southwest of the intersection of Farm-to-Market Road 2818 and Farm-to-Market Road 1688 (Leonard Road), 2000 feet southwest of the intersection of Leonard Road and Jones Road, five miles southwest of the City of Bryan in Brazos County, Texas.

SYNAGRO OF TEXAS CDR INC has applied for a renewal of Permit No. WQ0004450000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 218.71 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately 1.4 miles west of the intersection of Farm-to-Market Road 362 and Farm-to-Market Road 529, along the north side of Farm-to-Market Road 529 in Waller County, Texas.

SYNAGRO OF TEXAS CDR INC has applied for a renewal of Permit No. WQ0004448000, which authorizes the land application of sewage sludge for beneficial use on 73.83 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located on the west side of Adams Flat Road, approximately 0.7 mile south-southwest of the intersection of Adams Flat Road and Farm-to-Market Road 359 in Waller County, Texas.

SYNAGRO OF TEXAS CDR INC has applied for a renewal of Permit No. WQ0004449000, which will authorize the land application of sewage sludge for beneficial use on 82.37 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located approximately 1.4 miles south of the intersection of Farm-to-Market Road 362 and Farm-to-Market Road 529, on the west side of Farm-to-Market Road 362 in Waller County, Texas.

TOWN OF RANSOM CANYON has applied for a renewal of TPDES Permit No. WQ0010778001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 410,000 gallons per day. The facility is located approximately 1.2 miles west of Farm-to-Market Road 400 and approximately 4.8 miles south of Farm-to-Market Road 40, east of the City of Lubbock in Lubbock County, Texas.

UPPER LEON RIVER MUNICIPAL WATER DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0014206001, which authorizes the discharge of filter backwash water from a water treatment plant at a daily average flow not to exceed 249,000 gallons per day. The facility is located on Farm-to-Market Road 2861, 1.8 miles north of the intersection of Farm-to-Market Road 2861 and U.S. Highway 377, which is located 4.6 miles west of the City of Proctor in Comanche County, Texas.

UTILITIES INVESTMENT COMPANY INC has applied for a renewal of TPDES Permit No. WQ0012863001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 51,000 gallons per day. The facility is located approximately 1,000 feet northeast of the intersection of Crosby-Lynchburg Road and Fig Orchard Road in Harris County, Texas.

If you need more information about these permit applications or the permitting process; please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200806545
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 17, 2008

♦ ♦ ♦

Notice of Water Rights Applications

Notices issued December 4, 2008.

APPLICATION NO. 06-4847B; Angelina-Nacogdoches Counties Water Control and Improvement District No. 1, Applicant, 1524 Woodberry, Lufkin, Texas 75901, has applied to amend Certificate of Adjudication No. 06-4847 to increase the authorized consumptive amount from 20,600 acre-feet to 22,924 acre-feet out of Striker Creek Reservoir, Neches River Basin, Cherokee, Angelina, Nacogdoches, Smith and Rusk Counties. More information on the application and how to participate in the permitting process is given below. The application and fees were received on February 4, 2008. Additional information and fees were received on April 18, 2008, and additional information was received on October 3, 2008. The application was accepted for filing and declared administratively complete on June 12, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 5497A; Concan Water Supply Corporation, Applicant, P.O. Box 185, Concan, Texas 78838, has applied to sever 15 acre-feet of water per year for agricultural (irrigation) purposes authorized by Water Use Permit No. 5241, and combine that portion with the applicant's water rights authorized by Water Use Permit No. 5497, change the purpose use to municipal purposes, and change the diversion point and place of use for all the water authorized by Water Use Permit No. 5497. More information on the application and how to participate in the permitting process is given below. The application and fees were received on September 27, 2007. Additional information and fees were received on December 18, 2007, May 6 and July 14, 2008. The application was accepted for filing and declared administratively complete on July 18, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case

hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Texas Commission on Environmental Quality (TCEQ) Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200806546
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 17, 2008

♦ ♦ ♦

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: Semiannual Report due July 15, 2008, for Political Action Committees

Albert Alex Gonzalez, Travis County Republican National Hispanic Assembly, 14606 Gold Fish Pond Ave., Austin, Texas 78728

Deadline: 30-Day Pre-Election Report due October 6, 2008 for Candidates and Officeholders

Christopher G. Lane, 8025 Ohio Dr., Apt. 14101, Plano, Texas

Deadline: 8-Day Pre-Election Report due October 27, 2008 for Political Action Committees

April C. Seymour, Jefferson County Republican Executive Committee (CEC), P.O. Box 12246, Beaumont, Texas 77726-2246

TRD-200806443
David Reisman
Executive Director
Texas Ethics Commission
Filed: December 11, 2008

♦ ♦ ♦

Texas Facilities Commission

Request for Proposals #303-9-10590-A

The Texas Facilities Commission (TFC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), announces the issuance of Request for Proposals (RFP) #303-9-10590-A. TFC seeks a five (5) year lease of approximately 4,471 square feet of office space in Denton, Denton County, Texas.

The deadline for questions is January 5, 2009 and the deadline for proposals is January 15, 2009 at 3:00 p.m. The award date is February 19, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=80274*.

TRD-200806544
Kay Molina
General Counsel
Texas Facilities Commission
Filed: December 17, 2008

♦ ♦ ♦

Office of the Governor

Request for Grant Applications (RFA) for the Safe and Drug-Free Schools and Communities (SDFSC) Act Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that implement drug and violence prevention activities which complement or support local independent school district activities during the state fiscal year 2010 grant cycle.

Purpose: The purpose of the SDFSC Act Program is to support programs that prevent violence in and around schools; prevent the illegal use of alcohol, tobacco, and drugs; involve parents and communities; and are coordinated with related federal, state, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement.

Available Funding: Federal funding is authorized under the No Child Left Behind Act of 2001, Public Law 107-110. As of the date of the issuance of this RFA, the U.S. Congress has not finalized federal appropriations for federal fiscal year 2009. All awards are subject to the availability of appropriated funds and any modifications or additional requirements that may be imposed by law.

Standards: Grantees must comply with the standards applicable to this funding source contained in the *Texas Administrative Code* (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, or costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for government agencies that are for general agency use;

(5) weapons, ammunition, explosives or military vehicles;

(6) admission fees or tickets to any amusement park, recreational activity or sporting event;

(7) promotional gifts;

(8) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(9) membership dues for individuals;

(10) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(11) fundraising;

(12) construction;

(13) medical services;

(14) transportation, lodging, per diem, or any related costs for participants, when grant funds are used to develop and conduct training;

(15) legal services for adult offenders; and

(16) overtime pay.

Eligible Applicants:

(1) State agencies;

(2) Cities;

(3) Counties;

(4) Independent school districts;

(5) Nonprofit corporations;

(6) Native American tribes;

(7) Crime control and prevention districts;

(8) Universities;

(9) Colleges;

(10) Juvenile boards;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Council of governments; and

(14) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Projects must meet the following principles of effectiveness:

(a) be based on an assessment of objective data regarding the incidence of violence and illegal drug use in the elementary schools and secondary schools and communities to be served, including an objective analysis of the current conditions and consequences regarding violence and illegal drug use, including delinquency and serious discipline problems among students who attend such schools (including private school students who participate in the drug and violence prevention program) that is based on ongoing local assessment or evaluation activities;

(b) be based on an established set of performance measures aimed at ensuring that the elementary schools, secondary schools, and communities to be served by the program have a safe, orderly, and drug-free learning environment;

(c) be based on scientifically-based research that provides evidence that the program to be used will reduce violence and illegal drug use;

(d) be based on an analysis of the data reasonably available at the time of the prevalence of risk factors, including high or increasing rates of reported cases of child abuse and domestic violence; protective factors, buffers, assets; or other variables in schools and communities in the state identified through scientifically-based research; and

(e) include meaningful and ongoing consultation with and input from parents in the development of the application and administration of the program or activity.

(2) Grant activities must include:

(a) activities that complement and support local independent school district activities, including developing and implementing activities to prevent and reduce violence associated with prejudice and intolerance;

(b) dissemination of information about drug and violence prevention; and

(c) development and implementation of community-wide drug and violence prevention planning and organizing.

Eligible Activities:

(1) Community Assessment Center;

(2) Data Information/Sharing Systems;

(3) Delinquency Prevention;

(4) Gangs- Juvenile;

(5) Mentoring;

(6) Professional Therapy and Counseling;

(7) School Based Delinquency Prevention;

(8) Services to Children of Incarcerated Parents;

(9) Substance Abuse;

(10) Training and Technology;

(11) Youth Advocacy; and

(12) Youth Courts/Teen Courts.

Project Period: Grant-funded projects must begin on or after September 1, 2009, and expire on or before August 31, 2010.

Application Process: Applicants must access CJD's grant management website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to:

(1) programs or activities that prevent illegal drug use and violence for:

(a) children and youth who are not normally served by state educational agencies or local educational agencies; and

(b) populations that need special services or additional resources (such as youth in juvenile detention facilities, runaway or homeless children and youth, pregnant and parenting teenagers, and school dropouts).

(2) programs that pursue a comprehensive approach to drug and violence prevention that includes providing and incorporating mental health services related to drug and violence prevention.

Closing Date for Receipt of Applications: All applications must be certified via CJD's eGrants website on or before February 27, 2009.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications are forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee will prioritize all eligible applications based on identified community and/or comprehensive planning, cost, and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost effectiveness.

Contact Person: If additional information is needed, contact Angie Martin at amartin@governor.state.tx.us or (512) 463-1919.

TRD-200806539
Kevin Green
Assistant General Counsel
Office of the Governor
Filed: December 17, 2008

♦ ♦ ♦

Request for Grant Applications (RFA) for the State Criminal Justice Planning Fund (Fund 421) Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce crime and improve the criminal or juvenile justice system during the state fiscal year 2010 grant cycle.

Purpose: The purpose of the Fund 421 Program is to reduce crime and improve the criminal or juvenile justice system.

Available Funding: Section 102.056 of the Texas Code of Criminal Procedure establishes state funding for this purpose, and §772.006 of the Texas Government Code designates CJD as the administering agency. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Standards: Grantees must comply with the standards applicable to this funding source cited in the *Texas Administrative Code* (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) proselytizing or sectarian worship;

(2) lobbying;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) vehicles or equipment for government agencies that are for general agency use;

(5) weapons, ammunition, explosives or military vehicles;

(6) admission fees or tickets to any amusement park, recreational activity or sporting event;

(7) promotional gifts;

(8) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(9) membership dues for individuals;

(10) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (i.e., supplanting);

(11) fundraising;

(12) construction;

(13) medical services;

(14) transportation, lodging, per diem, or any related costs for participants, when grant funds are used to develop and conduct training; and

(15) legal services for adult offenders.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Independent school districts;

(4) Nonprofit corporations;

(5) Native American tribes;

(6) Crime control and prevention districts;

(7) Universities;

(8) Colleges;

(9) Hospital districts;

(10) Juvenile boards;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Councils of governments; and

(14) Faith-based organizations that provide direct services. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Projects must focus on reducing crime and improving the criminal or juvenile justice system;

(2) All projects providing direct assistance to crime victims must promote collaboration and coordination among local service systems that involve multiple disciplines and support a seamless delivery of a continuum of services that focus on each individual's return to physical, mental, and emotional health. An example of this type of approach is advocacy, law enforcement, prosecution, and other government and non-government services working together in a professional environment of cooperation and respect among service providers; and

(3) All juvenile projects or applications for projects serving delinquent or at-risk youth must address at least one of the following:

(a) Prevention and Early Intervention at First Offense. Programs or other initiatives designed to positively impact youth prior to their involvement in the juvenile justice system or at their first offense and divert them from a path of serious, violent and chronic delinquency. Programs may include support for school resource officers, alcohol and substance abuse education, mentoring and after-school programs.

(b) Disproportionate Minority Contact (DMC). Programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system. *Note: DMC exists if minority youth have a higher rate of contact with the juvenile justice system than do non-Hispanic white youth.*

(c) Gang Prevention and Intervention. Programs that address juvenile gang activity and the recruitment of juvenile members into gangs. Programs may include information sharing, prevention, and intervention efforts directed at reducing gang-related activities.

(d) Specialized Treatment Services. Programs that address the use and abuse of illegal substances, prescription and non-prescription drugs and alcohol. Counseling and professional therapy may also be provided to juvenile sex offenders and youth with anger management issues.

(e) Juvenile Justice System Impact. Programs designed to promote offender accountability or improve the practices, policies or procedures within the juvenile justice system. Programs may include the rehabilitation and education of youth who have been involved in the juvenile justice system with the goal of deterring future involvement in criminal activity.

Project Period: Grant-funded projects must begin on or after September 1, 2009, and expire on or before August 31, 2010.

Application Process: Applicants can access CJD's eGrants website at https://cjdonline.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to applicants who demonstrate cost effective programs focused on a comprehensive and effective approach to services that compliment the Governor's strategies.

Closing Date for Receipt of Applications: All applications must be certified via CJD's eGrants website on or before February 27, 2009.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications will be forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee prioritizes all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) CJD will accept priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on COG priorities, reasonableness, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Judy Switzer at jswitzer@governor.state.tx.us or (512) 463-1919.

TRD-200806538
Kevin Green
Assistant General Counsel
Office of the Governor
Filed: December 17, 2008

♦ ♦ ♦

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed effective date for this amendment is January 1, 2009.

The proposed amendment will revise the reimbursement methodology for Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) to exempt the purchase of Augmented Communication Devices (ACDs) from the cost limits that apply to other types of durable medical equipment. The amendment also will remove outdated language.

The proposed amendment is estimated to result in additional annual aggregate expenditures of $180,000 for the remainder of federal fiscal year (FFY) 2009 (January 1, 2009, through September 30, 2009), with approximately $105,588 in federal funds and approximately $74,412 in state general revenue. For FFY 2010, the proposed amendment is estimated to result in additional annual aggregate expenditures of $180,000, with approximately $105,588 in federal funds and approximately $74,412 in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Cheryl Jablonski by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1764; by facsimile at (512) 491-1998; or by e-mail at cheryl.jablonski@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200806503
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 15, 2008

♦ ♦ ♦

Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendments to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendments are effective January 1, 2009.

The amendments will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for services provided by:

Physicians and Certain Other Practitioners

Providers of Clinical Diagnostic Laboratory Services

Providers of Family Planning Services

Providers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

Ambulatory Surgical Centers (ASCs)

Maternity Service Clinics (MSCs)

Providers of Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services (referred to in Texas as Texas Health Steps (THSteps))

Certified Pediatric Nurse Practitioners and Certified Family Nurse Practitioners (referred to in Texas as Advance Practice Nurses, including Nurse Practitioners and Clinical Nurse Specialists)

Physician Assistants

The proposed amendments are estimated to result in an additional annual aggregate expenditure of $5,372,835 for federal fiscal year (FFY) 2009, with approximately $3,201,253 in federal funds and $2,171,582 in State General Revenue (GR). For FFY 2010, the estimated additional aggregate expenditure is $7,374,320, with approximately $4,339,429 in federal funds and $3,034,891 in GR. For FFY 2011, the estimated

additional aggregate expenditure is $8,006,163, with approximately $4,672,155 in federal funds and $3,334,008 in GR.

Interested parties may obtain copies of the proposed amendments by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at Dan.Huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200806517
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 15, 2008

♦ ♦ ♦

Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective January 1, 2009.

The Texas Medicaid Buy-In (MBI) program extends Medicaid coverage to working individuals with disabilities whose earnings are too high for them to qualify for regular Medicaid. Individuals in the MBI program pay monthly premiums based on their income. The proposed amendment would establish a $500 limit on the total monthly premium per person in the MBI program. The proposed amendment will help to make the program more affordable for some MBI clients.

The proposed amendment will have no fiscal impact to the state or federal budgets.

For additional information or a copy of the amendment, please contact Stephanie Stephens in the Acute Care Policy Development unit of the Medicaid and CHIP Division by telephone at (512) 491-1482 or be e-mail at Stephanie.Stephens@hhsc.state.tx.us.

TRD-200806527
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 16, 2008

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by FIRSTCOMP INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Omaha, Nebraska.

Application for incorporation in the State of Texas by NAFTA INSURANCE COMPANY, a domestic fire and casualty company. The home office is in Brownsville, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200806548
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 17, 2008

♦ ♦ ♦

Notice of Filings

The Texas Automobile Insurance Plan Association (TAIPA) has filed Petition No. A-0508-09, Petition No. A-0508-10, and Petition No. A-0808-16, proposing amendments to the Plan of Operation (Plan) for consideration by the Commissioner of Insurance (Commissioner). The petitions contain amendments to the Plan that have been approved by the TAIPA Governing Committee.

The Insurance Code §2151.151 provides that the TAIPA Governing Committee may make and amend the Plan of Operation, subject to the approval of the Commissioner.

In Petition No. A-0508-09, TAIPA proposes to amend the Plan to delete references to the Electronic Submission Procedure (ESP), an automated telephone system for the submission of TAIPA insurance applications. The ESP has been upgraded into a more advanced system known as the Electronic Application Submission interface (EASi), and requirements for electronic submissions have been modified.

In Petition No. A-0508-10, TAIPA proposes to amend the Plan to specify that the terms of office for the alternate public and producer members of the TAIPA Governing Committee are two years.

In Petition No. A-0808-16, TAIPA proposes to amend the Plan to delete references to truckers because the Truckers Policy is no longer available through TAIPA.

Throughout the three petitions, TAIPA proposes to make non-substantive editorial changes to the Plan. The editorial changes include proposing to delete references to obsolete terms and requirements, to reformat the structure of sections for purposes of organization and clarity, to renumber subsections, and to conform references to the Insurance Code to the updated references enacted in the non-substantive Insurance Code revision by the 79th Legislature in HB 2017, effective April 1, 2007.

The description of proposed Plan amendments is a summary prepared by the Texas Department of Insurance. For the full text of the proposed amendments, a copy of the petitions, or further information, contact Cathleen Beavers at TAIPA at (866) 321-9154.

These amendments are subject to the Commissioner's consideration for approval without a hearing. Any comments may be filed with the Office of the Chief Clerk, Texas Department of Insurance, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104, within 15 days after publication of this notice. An additional copy is to be simultaneously submitted to Cathleen Beavers, Texas Automobile Insurance Plan Association, 4301 Westbank Dr., Suite 200, Austin, Texas 78746.

TRD-200806547
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 17, 2008

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1168 "Casino Royale"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1168 is "CASINO ROYALE". The play style for this game is "multiple games".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1168 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1168.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A CARD SYMBOL, K CARD SYMBOL, Q CARD SYMBOL, J CARD SYMBOL, 10 CARD SYMBOL, 9 CARD SYMBOL, 8 CARD SYMBOL, 7 CARD SYMBOL, 6 CARD SYMBOL, 5 CARD SYMBOL, 4 CARD SYMBOL, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, $50,000, APPLE SYMBOL, ORANGE SYMBOL, MELON SYMBOL, BANANA SYMBOL, STAR SYMBOL, LEMON SYMBOL, BELL SYMBOL, HORSESHOE SYMBOL, CLOVER SYMBOL, GOLD BAR SYMBOL, 7 SYMBOL, WISH BONE SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, CHERRY SYMBOL, 1 DICE SYMBOL, 2 DICE SYMBOL, 3 DICE SYMBOL, 4 DICE SYMBOL, 5 DICE SYMBOL, 6 DICE SYMBOL, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and DOLLAR BILL SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1168 - 1.2D

PLAY SYMBOL	CAPTION
A CARD SYMBOL	ACE
K CARD SYMBOL	KNG
Q CARD SYMBOL	QUN
J CARD SYMBOL	JCK
10 CARD SYMBOL	TEN
9 CARD SYMBOL	NIN
8 CARD SYMBOL	EGT
7 CARD SYMBOL	SVN
6 CARD SYMBOL	SIX
5 CARD SYMBOL	FIV
4 CARD SYMBOL	FOR
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU
APPLE SYMBOL	APL
ORANGE SYMBOL	ORG
MELON SYMBOL	MEL
BANANA SYMBOL	BAN
STAR SYMBOL	STA
LEMON SYMBOL	LEM
BELL SYMBOL	BEL
HORSESHOE SYMBOL	SHO
CLOVER SYBOL	CLO
GOLD BAR SYMBOL	BAR
7 SYMBOL	SVN
WISH BONE SYMBOL	WBN
CROWN SYMBOL	CRN
DIAMOND SYMBOL	DMD
CHERRY SYMBOL	CHY
1 DICE SYMBOL	ONE
2 DICE SYMBOL	TWO
3 DICE SYMBOL	THR
4 DICE SYMBOL	FOR
5 DICE SYMBOL	FIV
6 DICE SYMBOL	SIX
1	ONE
2	TWO
3	THR

4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	THN
14	FRN
15	FTN
16	SXT
17	SVT
18	EGN
19	NIT
20	TWY
DOLLAR BILL SYMBOL	DBL

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1168), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1168-0000001-001.

K. Pack - A pack of "CASINO ROYALE" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASINO ROYALE" Instant Game No. 1168 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CASINO ROYALE" Instant Game is determined once the latex on the ticket is scratched off to expose 60 (sixty) Play Symbols. In Game 1, the player adds the cards in each HAND. If any of YOUR HANDS beat the DEALER, the player wins the PRIZE shown for that HAND. In Game 2, if a player reveals 3 matching symbols within a ROW, the player wins the PRIZE shown for that ROW. In Game 3, the player adds the dice in each ROLL. If the total of the roll equals 7 or 11, the player wins PRIZE shown for that ROLL. In Game 4, if the player reveals 3 matching prize amounts, the player wins that amount. In Game 5, if a player matches any of YOUR NUMBERS to either of the WINNING NUMBERS, the player wins the PRIZE shown for that number. If the player reveals a "dollar bill" play symbol, the player wins DOUBLE the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 60 (sixty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 60 (sixty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 60 (sixty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 60 (sixty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The top prize will appear on every ticket unless otherwise restricted.

C. GAME 1: No duplicate non-winning prize symbols in this game.

D. GAME 1: No duplicate non-winning YOUR HANDS in any order.

E. GAME 1: No HAND will contain two aces.

F. GAME 1: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

G. GAME 1: There will be no ties between the DEALER and any YOUR HANDS.

H. GAME 1: The DEALER will never total 21.

I. GAME 1: The DEALER will always total at least 12 but no more than 20.

J. GAME 1: The YOUR HANDS will never total less than 14.

K. GAME 2: No duplicate non-winning prize symbols in this game.

L. GAME 2: No duplicate non-winning ROWS in any order.

M. GAME 2: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

N. GAME 2: There will be many near wins, defined as two matching play symbols within a ROW.

O. GAME 3: No duplicate non-winning prize symbols in this game.

P. GAME 3: No duplicate non-winning ROLLS in any order.

Q. GAME 3: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

R. GAME 4: No three pairs of matching play symbols.

S. GAME 4: No more than 3 matching play symbols.

T. GAME 4: Game may only win once.

U. GAME 5: No three or more matching non-winning prize symbols in this game.

V. GAME 5: No duplicate non-winning YOUR NUMBERS play symbols.

W. GAME 5: No duplicate WINNING NUMBERS play symbols on a ticket.

X. GAME 5: The "DOLLAR BILL" (doubler) play symbol will only appear as dictated by the prize structure.

Y. GAME 5: Non-winning prize symbols will never be the same as the winning prize symbol(s) in this game.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASINO ROYALE" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to, pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASINO ROYALE" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASINO ROYALE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CASINO ROYALE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CASINO ROYALE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1168. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1168 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	480,000	12.50
$10	640,000	9.38
$15	180,000	33.33
$20	160,000	37.50
$50	80,000	75.00
$100	6,150	975.61
$500	800	7,500.00
$1,000	200	30,000.00
$5,000	17	352,941.18
$50,000	8	750,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.88. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1168 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1168, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200806455
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 12, 2008

♦ ♦ ♦

Instant Game Number 1176 "Lucky 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1176 is "LUCKY 7'S". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1176 shall be $7.00 per ticket.

1.2 Definitions in Instant Game No. 1176.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, BLACK 7 SYMBOL $7.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $500, $2,000 and $70,000. The possible green play symbols are: 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40 and GREEN 7 SYMBOL and CLOVER SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1176 - 1.2D

PLAY SYMBOL	CAPTION
1 (black)	ONE
2 (black)	TWO
3 (black)	THR
4 (black)	FOR
5 (black)	FIV
6 (black)	SIX
8 (black)	EGT
9 (black)	NIN
10 (black)	TEN
11 (black)	ELV
12 (black)	TLV
13 (black)	TRN
14 (black)	FTN
15 (black)	FFN
16 (black)	SXN
18 (black)	ETN
19 (black)	NTN
20 (black)	TWY
21 (black)	TWON
22 (black)	TWTO
23 (black)	TWTH
24 (black)	TWFR
25 (black)	TWFV
26 (black)	TWSX
28 (black)	TWET
29 (black)	TWNI
30 (black)	TRTY
31 (black)	TRON
32 (black)	TRTO
33 (black)	TRTH
34 (black)	TRFR
35 (black)	TRFV
36 (black)	TRSX
38 (black)	TRET
39 (black)	TRNI
40 (black)	FRTY
7 SYMBOL (black)	WIN
1 (green)	ONE
2 (green)	TWO
3 (green)	THR
4 (green)	FOR
5 (green)	FIV
6 (green)	SIX
8 (green)	EGT
9 (green)	NIN
10 (green)	TEN

11 (green)	ELV
12 (green)	TLV
13 (green)	TRN
14 (green)	FTN
15 (green)	FFN
16 (green)	SXN
18 (green)	ETN
19 (green)	NTN
20 (green)	TWY
21 (green)	TWON
22 (green)	TWTO
23 (green)	TWTH
24 (green)	TWFR
25 (green)	TWFV
26 (green)	TWSX
28 (green)	TWET
29 (green)	TWNI
30 (green)	TRTY
31 (green)	TRON
32 (green)	TRTO
33 (green)	TRTH
34 (green)	TRFR
35 (green)	TRFV
36 (green)	TRSX
38 (green)	TRET
39 (green)	TRNI
40 (green)	FRTY
7 SYMBOL (green)	DBL
CLOVER SYMBOL	WINALL
$7.00 (black)	SEVEN$
$10.00 (black)	TEN$
$15.00 (black)	FIFTN
$20.00 (black)	TWENTY
$40.00 (black)	FORTY
$50.00 (black)	FIFTY
$100 (black)	ONE HUND
$500 (black)	FIV HUND
$2,000 (black)	TWO THOU
$70,000 (black)	70 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $7.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $70,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1176), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1176-0000001-001.

K. Pack - A pack of "LUCKY 7'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LUCKY 7'S" Instant Game No. 1176 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LUCKY 7'S" Instant Game is determined once the latex on the ticket is scratched off to expose 40 (forty) Play Symbols. If the player reveals a BLACK "7" play symbol, the player wins PRIZE shown for that symbol. If the player reveals a GREEN "7" play symbol, the player wins DOUBLE the PRIZE shown. If the player reveals a "CLOVER" play symbol, the player WINS ALL 20 prizes! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 40 (forty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 40 (forty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 40 (forty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 40 (forty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "GREEN 7" (doubler) play symbol will only appear as dictated by the prize structure.

C. The "CLOVER" (win all) play symbol will only appear as dictated by the prize structure.

D. The "BLACK 7" (auto win) play symbol will only appear as dictated by the prize structure.

E. There will be a minimum of 4 and a maximum of 12 green play symbols on every ticket unless otherwise restricted by the prize structure.

F. No more than four matching non-winning prize symbols will appear on a ticket

G. No duplicate non-winning play symbols on a ticket regardless of color.

H. Non-winning prize symbols will never be the same as the winning prize symbol(s).

I. No prize amount in a non-winning spot will correspond with the play symbol (i.e. 20 and $20).

J. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY 7'S" Instant Game prize of $7.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to, pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LUCKY 7'S" Instant Game prize of $2,000 or $70,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY 7'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LUCKY 7'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LUCKY 7'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1176. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1176 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$7	403,200	12.50
$10	470,400	10.71
$15	201,600	25.00
$20	235,200	21.43
$50	67,200	75.00
$100	35,700	141.18
$500	2,562	1,967.21
$2,000	87	57,931.03
$70,000	5	1,008,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.56. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1176 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1176, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200806502
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 15, 2008

♦ ♦ ♦

Notice of Public Comment Hearing

A public hearing to receive public comments regarding the proposed new 16 TAC §402.409 relating to Amendment for Change of Premises due to Lease Termination or Abandonment, proposed new 16 TAC §402.412, relating to Signature Requirements, and proposed new 16 TAC §402.424, relating to Amendment of a License by Telephone or Facsimile, will be held on January 21, 2009, at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200806505
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 15, 2008

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 9, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Comcast of Houston, LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36476 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City of Needville, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36476.

TRD-200806481
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2008

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 11, 2008, Consolidated Communications Transport Company filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60678. Applicant intends to reflect a corporate restructuring.

The Application: Application of Consolidated Communications Transport Company for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 36481.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 31, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36481.

TRD-200806524
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2008

♦ ♦ ♦

Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On December 10, 2008, InteraTel, LLC filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60762. Applicant intends to relinquish its certificate.

The Application: Application of InteraTel, LLC to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 36478.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 29, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36478.

TRD-200806523
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 16, 2008

♦ ♦ ♦

Revised Notice of Application for Approval of a Revised Nodal Market Implementation Surcharge and Request for Interim Relief

On November 19, 2008, the Electric Reliability Council of Texas, Inc. (ERCOT) filed with the Public Utility Commission of Texas (commission) an application for approval of a revised nodal market implementation surcharge and request for interim relief.

Pursuant to the *Order Nunc Pro Tunc* issued in Docket Number 32686, "ERCOT may initiate commission proceedings to change the Nodal Surcharge only if the change in the Nodal Program cost estimate leading to the request is more than 10% higher or lower than the amounts presented in this proceeding." In Docket Number 35428, the commission approved the current Nodal Surcharge of $0.169 per megawatt-hour (MWh). ERCOT requests interim approval to change the Nodal Surcharge to $0.38 per MWh. ERCOT requests that the interim Nodal Surcharge become effective by February 1, 2009, and remain in effect until the commission approves a final Nodal Surcharge based on review of the ERCOT Nodal implementation schedule and budget developed after the commission issues its recommendations based on the cost-benefit analysis (CBA) study. ERCOT stated that the current surcharge is not sufficient to recover additional Nodal implementation costs because it was formulated based on the assumption that Nodal implementation activities funded by the Nodal Surcharge would be complete by January 1, 2009.

Persons who wish to intervene or comment in this proceeding should notify the Public Utility Commission of Texas within 30 days of the date of this notice. A request to intervene or requests to obtain further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. A request to intervene shall include a statement of position containing a concise statement of the requestor's position on the application, a concise statement of each question of fact, law, or policy that the requestor considers at issue and a concise statement of the requestor's position on each issue identified. The deadline for intervention is Friday, January 2, 2009. All comments and interventions should reference Docket Number 36412.

ERCOT has posted notice and a copy of its application on its website at http://www.ercot.com/about/governance/legal_notices.html. Interested parties may also access ERCOT's application through the Public Utility Commission's web site at http://www.puc.state.tx.us under Docket Number 36412, *Application of the Electric Reliability Council of Texas for Approval of a Revised Nodal Market Implementation Surcharge and Request for Interim Relief*.

TRD-200806480
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2008

♦ ♦ ♦

Texas Residential Construction Commission

Questions Regarding County Inspection Program

Changes in Title 16 of the Texas Property Code that became effective on September 1, 2008, require that builders and remodelers who undertake certain residential construction projects in areas outside municipalities have those projects inspected at several stages of construction. This requirement for interim construction inspections, which are similar to the code compliance inspections required on residential projects built within most municipalities, provides homebuyers and homeowners who live outside municipalities the same level of assurance of quality construction that those with construction projects subject to municipal inspections enjoy. Because this requirement is new for construction outside municipalities, the Texas Residential Construction Commission (commission) anticipates that some builders and remodelers will either be unaware of the requirement at the time of construction or may forget to have a phase inspection performed before moving to the next phase of construction.

New home construction must have an inspection prior to the pouring of the foundation, prior to the installation of wall coverings for plumbing, electrical and mechanical inspections, and at the substantial completion of the project. For remodeling projects and material improvements, inspections are required for the same phases to the extent that the inspec-

tion is applicable to the work performed. For the phase inspections that are performed before completion of the project, it can be difficult to access or view the relevant components to determine whether they were correctly installed.

At its meeting in December, 2008 the commission approved the following disciplinary guideline for builders and remodelers that fail to conduct county inspections at the appropriate stages of construction. The issue for which the commission is now seeking guidance is for measures that would be required of the builder/remodeler in addition to any disciplinary action taken.

Penalty Matrix

The following penalty matrix will guide disciplinary action in the event a builder/remodeler neglected to perform inspections, and was forthcoming about the oversight. If a builder/remodeler attempts to hide the oversight by providing false information at registration and the commission discovers the violation, this penalty matrix does not apply.

1. 1st Offense--Warning--The commission will send a letter notifying builder/remodeler of program with a link to Web site and a copy of law. The homeowner will receive a letter from the commission stating that builder/remodeler did not comply with the County Inspection Program and that the home should have received a minimum of three inspections.

2. 2nd Offense--Fine--The commission will commence a disciplinary action for failure to comply with the County Inspection Program and will impose a fine of $5,000 per project on the builder/remodeler.

3. 3rd Offense or more--Fine--The commission will commence a disciplinary action for failure to comply with the County Inspection Program and will impose a larger fine of up to $10,000 per project on the builder/remodeler and possibly suspend or revoke the registration certificate.

Therefore, the commission is studying the issue of what can be done to provide a homebuyer or homeowner with some level of assurance that a home has been built in accordance with applicable construction codes when an inspection was not performed timely. The commission is seeking input from industry professionals and consumers who may have suggestions that will guide the commission's proposed response to this dilemma. Some thoughts are indicated by the questions below. Other ideas may include requiring the builder to pay for an independent inspection to be conducted near the end of each warranty period and an agreement to repair any construction defects identified by that inspector, or like remedies that offer the homeowner some assurance.

(1) When the lack of an inspection involves the foundation:

Would it be helpful to require forensic investigation by a licensed Texas Professional Engineer to include:

a. Excavation of exterior concrete beams to verify proper depth;

b. Counting "Live" and "Dead Ends" in the case of a Post-tensioned slab-on-grade;

c. Performing a "Lift-Off" Procedure on 25% of the cables to verify proper stressing;

d. Verification of pier depth and belling, if applicable; or

e. Conducting cores of the foundation in strategic locations determined by an engineer to verify the concrete has met the design strength?

(2) For a post tension slab, which is generally engineered, would a certification letter from the inspecting engineer provide sufficient assurance that the slab has been built correctly?

(3) When the lack of inspection involves the structural frame would it be helpful to require a licensed Texas Professional Engineer to conduct a forensic inspection involving removal of sheetrock or exterior brick in an amount to be determined by the engineer? Is there a less intrusive way to conduct a forensic inspection of the structure to determine if the framing is correctly installed?

(4) When the lack of inspection involves the final inspection of mechanical delivery systems, would any of the following be helpful:

a. Written verification of compliance from a Master Electrician or Master Plumber?

b. Forensic investigations for plumbing can include many tests. What tests are necessary?

i. Pressurizing the water lines

ii. Smoke test for vent leaks

iii. Water test for sewer lines

c. Should HVAC investigations only emphasize the proper equipment installation or should there be evidence provided on how the system was sized? Should testing be conducted to verify the TRCC Performance Standards of 78 degrees with a 4 degree temperature variation?

(5) How can the builder address these phase inspection issues after the owners have closed and moved in?

Interested persons may send written comments regarding this issue to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13144, Austin, Texas 78711-3144. Comments regarding the County Inspection Program will be accepted for 30 days following the date of publication of this notice in the *Texas Register.* Comments may also be sent electronically to comments@trcc.state.tx.us. Please put "County Inspection Issues" in the subject line so that your submission will be considered.

The commission will utilize the information it receives to craft a proposal for handling the issue described. The commission may adopt a rule to address this issue that will be published for comment in the *Texas Register.*

TRD-200806552
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: December 17, 2008

♦ ♦ ♦

The Texas A&M University System

Award Notification

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas A&M University System (TAMUS) has entered into a consulting contract for benefits consulting services. The consultant will assist with management of the A&M System's health, benefit, retirement, and Workers' Compensation (WCI) insurance plans.

The Name and Address of Consultant is as follows: Gallagher Benefits Services, Inc, 6399 S. Fiddler's Green Circle, Ste 200, Greenwood Village, Colorado 80111.

The A&M System will pay an amount of $38,750.00. The contract will begin on December 5, 2008 and shall terminitate in one year year unless renewed for additonal years up to October 31, 2014.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to TAMUS, no later than one year after completion of services.

Any questions regarding this posting should be directed to: Don Barwick, HUB & Procurement Manager, Office of HUB & Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste 1273, College Station, Texas 77845, Voice: (979) 458-6410, E-mail: dbarwick@tamu.edu.

TRD-200806510
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: December 15, 2008

♦ ♦ ♦

Award of Request for Qualifications

Texas A&M University-Corpus Christi

RFQ 8-0004 Academic Program Needs Assessment

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Texas A&M University-Corpus Christi furnishes this notice of consultant contract award. A notice for request for proposals was published in the July 4, 2008, issue of the *Texas Register* (33 TexReg 5428).

1. A description of the activities that the consultant will conduct: Conduct higher education market research (including, but not limited to review of existing market and enrollment data, interviews with key stakeholders in designated markets, and surveys of current and potential users of higher education) to determine opportunities and priorities for: (1) adding degree programs for areas in which we currently have planning authority but no programs; (2) adding degree programs in areas in which we do not presently have planning authority; (3) expanding programs which we currently offer; (4) adding distance education programs; and (5) identifying programs for which transfer student opportunities exist.

2. The name and business address of the consultant:

MGT of America, Inc.

2123 Centre Pointe Boulevard

Tallahassee, Florida 32308-4930

3. The total Value of the Contract:

$67,615.00

4. The beginning and ending dates of the contract:

November 1, 2008 to October 31, 2009

5. The dates on which documents, films, recordings, or reports that the consultant is required to present to the agency are due:

March 31, 2009.

David Davila

Associate Director

(361) 825-2616

TRD-200806533
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: December 16, 2008

♦ ♦ ♦

Texas Department of Transportation

Corrected Notice: Request for Competing Proposals - Existing I-10 Interchange at Schuster Avenue, El Paso, Texas

In the December 12, 2008, issue of the *Texas Register* (33 TexReg 10249), the Texas Department of Transportation published a Request for Competing Proposals - Existing I-10 Interchange at Schuster Avenue, El Paso. In that notice, the Internet address for the Texas Electronic State Business Daily is incorrect. Following is the corrected notice:

Pursuant to Transportation Code, §222.104, and 43 Texas Administrative Code (TAC) Chapter 5, Subchapter E, the Texas Department of Transportation (department) announces the issuance of its Request for Competing Proposals (RFCP) to design, construct, and finance multiple improvements to the existing I-10 interchange at Schuster Avenue (University of Texas at El Paso's main entrance) in El Paso, Texas under a pass-through toll agreement.

The department has received a proposal from a private entity under 43 TAC Chapter 5, Subchapter E. The department intends to evaluate that proposal, and it may negotiate a pass-through toll agreement with the proposer based on the proposal. The department will accept for simultaneous consideration any competing proposals it receives that are submitted in accordance with 43 TAC Chapter 5, Subchapter E, and the RFCP by the due date. The due date for competing proposals is 3:00 p.m. Central Standard Time, Monday, January 26, 2009. Competing proposals should be addressed to Phillip Russell, Assistant Executive Director for Innovative Project Development, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701.

The project as proposed calls for multiple improvements to the existing I-10 interchange at Schuster Avenue (University of Texas at El Paso's main entrance) in west El Paso, El Paso County, Texas.

The general criteria that will be used to evaluate all proposals and the relative weight given to the criteria are as follows: General Experience and Qualifications - 40%; Project Development and Benefits - 60%. Specific evaluation criteria are set forth in the RFCP.

The department will make the RFCP available electronically on the Texas Electronic State Business Daily,

http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=80222

and at the following address: Texas Department of Transportation, Attention: Mark Marek, 118 East Riverside Drive, Building 118, Austin, Texas 78704, on or after Friday, December 12, 2008.

TRD-200806525
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 16, 2008

♦ ♦ ♦

Public Hearing Notice - Statewide Transportation Improvement Program

The Texas Department of Transportation (department) will hold a public hearing on Monday, January 12, 2009, at 10:00 a.m. at the Texas Department of Transportation, 200 East Riverside Drive, Room 1A-1, Austin, Texas to receive public comments on the November 2008 Revisions to the Statewide Transportation Improvement Program (STIP) for FY 2008-2011. The STIP reflects the federally funded transportation projects in the FY 2008-2011 Transportation Improvement Programs (TIPs) for each Metropolitan Planning Organization (MPO) in the state. The STIP includes both state and federally funded projects for the nonattainment areas of Beaumont, Dallas-Fort Worth, El Paso,

and Houston. The STIP also contains information on federally funded projects in rural areas that are not included in any MPO area, and other statewide programs as listed.

Title 23, United States Code, §134 and §135 require each designated MPO and the state, respectively, to develop a TIP as a condition to securing federal funds for transportation projects under Title 23 or the Federal Transit Act (49 USC §5301, et seq.).

Section 134(j) requires an MPO to develop its TIP in cooperation with the state and affected transportation operators, to provide an opportunity for interested parties to participate in the development of the program, and further requires the TIP to be updated at least once every four years and approved by the MPO and the Governor or Governor's designee. Section 135(g) requires the state to develop a STIP for all areas of the state in cooperation with the designated MPOs and, with respect to non-metropolitan areas, in consultation with affected local officials, and further requires an opportunity for participation by interested parties as well as approval by the Governor or the Governor's designee.

In accordance with 43 TAC §15.8(d), a copy of the proposed November 2008 Revisions to the FY 2008-2011 STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, and on the department's website at:

www.dot.state.tx.us

Persons wishing to review the November 2008 Revisions to the FY 2008-2011 STIP may do so online or contact the Transportation Planning and Programming Division at (512) 486-5033.

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 not later than Friday, January 9, 2009, or they may register at the hearing location beginning at 9:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-9957. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Further information on the FY 2008-2011 STIP may be obtained from Lori Morel, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704, (512) 486-5033. Interested parties who are unable to attend the hearing may submit comments to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by Monday, February 9, 2009, at 4:00 p.m.

TRD-200806549

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 17, 2008

♦ ♦ ♦

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and 43 Texas Administrative Code §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm

Or visit **www.txdot.gov,** click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200806526
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 16, 2008

♦ ♦ ♦

University of North Texas

Notice After Amending Consulting Contract

In accordance with Chapter 2254 of the Texas Government Code, the University of North Texas ("UNT") has amended a major consulting services contract related to dining services

The consulting firm will assist UNT in: providing an assessment of the current dining program relative to industry standards and current trends. The firm will further evaluate the dining services offered by UNT. Generally, the scope of services supplied by the selected vendor will include the following: (1) review of UNT financial, student, and operating data; (2) site visits to assess the appearance and functionality of operating units, catering and retail operations, and administrative support and management of existing dining services; (3) review, evaluate the current dining services organizational structure and needs required to transition to single provider structure, evaluate financial impact of recommended structure; (4) develop job descriptions for newly created job positions; (5) evaluate and analyze residential dining operations for consolidations; and (6) provide continued consulting support during transitions.

The name and business address of the consultant is:

Envision Strategies

701 Sixteenth Street

New Cumberland, PA 17070

UNT will pay a consulting fee not to exceed $9,800, and will reimburse expenses not to exceed cost plus 10% - anticipated $0 expense, unless special delivery is required. The term of the consulting contract has not changed and runs began May 1, 2008, and will end August 31, 2009.

TRD-200806434

Carrie Stoeckert
Assistant Director
University of North Texas
Filed: December 11, 2008

♦ ♦ ♦

University of North Texas System

Invitation for Consultants to Provide Offers of Consulting Services Related to Human Resources and Informational Technology Structure Review

Pursuant to the provisions of Texas Government Code, Chapter 2254, the University of North Texas (UNT) System extends this invitation (Invitation) to qualified and experienced consultants interested in providing the consulting services described in this Invitation to the UNT System and its member institutions.

Scope of Work:

The selected consulting firm will be responsible for assisting the UNT System and member institutions in studying and analyzing the UNT System's Human Resources and Informational Technology functions currently managed and planned at the institution level and to recommend those functions that would be best handled at the UNT System level.

Specifications:

Any consultant submitting an offer in response to this Invitation must provide a response to the Request for Proposals (RFP) posted on the UNT's website under the Bid Listings Page found at http://pps.unt.edu. The following information will need to be included in the response: (1) the consultant's legal name, including type of entity (individual, partnership, corporation, etc.) and address; (2) background information regarding the consultant, including the number of years in business and the number of employees; (3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services; (4) the hourly rate to be charged for each team member providing services; (5) the earliest date by which the consultant could begin providing the services; (6) a list of five client references, including any complex institutions or systems of higher education for which the consultant has provided similar consulting services; (7) a statement of the consultant's approach to providing the services described in the Scope of Work section of this Invitation, any unique benefits the consultant offers the UNT System, and any other information the consultant desires the UNT System to consider in connection with the consultant's offer; (8) information to assist the UNT System in assessing the consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation; (9) information to assist the UNT System in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education; (10) information to assist the UNT System in assessing whether the consultant will have any conflicts of interest in performing the requested services; (11) information to assist the UNT System in assessing the overall cost to the UNT System for the requested services to be performed; and (12) information to assist the UNT System in assessing the consultant's capability and financial resources to perform the requested services.

Selection Process:

The consulting services do not relate to services previously provided to the UNT System.

Selection of the Successful Offer (defined below) submitted in response to the RFP posted under the bid listings tab found at http://pps.unt.edu, RFP769-9-623-CM by the Submittal Deadline located in the posted RFP will be made using the competitive process described below. After the opening of the offers and upon completion of the initial review and evaluation of the offers submitted, selected consultants may be invited to participate in oral presentations. The selection of the Successful Offer may be made by the UNT System on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, selection of the Successful Offer may be made by the UNT System on the basis of negotiation with any of the consultants. At the UNT System's sole option and discretion, it may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, a competitive range of acceptable or potentially acceptable offers may be established comprising the highest rated offers. The UNT System will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. The UNT System will not disclose any information derived from the offers submitted by competing consultants in conducting such discussions. Further action on offers not included within the competitive range will be deferred pending the selection of the Successful proposal, however, the UNT System reserves the right to include additional offers in the competitive range if deemed to be in its best interest. After the submission of offers but before final selection of the Successful Offer is made, the UNT System may permit a consultant to revise its offer in order to obtain the consultant's best final offer. The UNT System is not bound to accept the lowest priced offer if that offer is not in its best interest, as determined by the UNT System. The UNT System reserves the right to: (a) enter into agreements or other contractual arrangements for all or any portion of the Scope of Work set forth in this Invitation with one or more consultants; (b) reject any and all offers and re-solicit offers; or (c) reject any and all offers and temporarily or permanently abandon this procurement, if deemed to be in the best interest of the UNT System.

Criteria for Selection:

The successful offer (Successful Offer) must be submitted in response to the Request for Proposal (RFP769-9-623-CM) posted on the UNT's website http://pps.unt.edu by the Submittal Deadline will be the offer that is the most advantageous to the UNT System in the UNT System's sole discretion. Offers will be evaluated by UNT System and member institution personnel. The evaluation of offers and the selection of the Successful Offer will be based on the information provided to the UNT System by the consultant in response to the Specifications section of the RFP. Consideration may also be given to any additional information and comments if such information or comments increase the benefits to the UNT System. The successful consultant will be required to enter into a contract acceptable to the UNT System.

Consultant's Acceptance of Offer:

Submission of an offer by a consultant indicates: (1) the consultant's acceptance of the Offer Selection Process, the Criteria for Selection, and all other requirements and specifications set forth in this Invitation; and (2) the consultant's recognition that some subjective judgments must be made by the UNT System during this Invitation process.

Submittal Deadline:

To respond to the RFP, consultants must submit the information requested in the Specification section of the RFP found at http://pps.unt.edu and any other relevant information in a clear and concise written format to: Chris McCaskill, Purchasing Specialist IV, University of North Texas System, 2310 North Interstate 35-E, Denton, Texas 76205. Offers must be submitted in accordance with the posted RFP.

Questions:

Questions concerning this Invitation should be directed to: Chris McCaskill, Purchasing Specialist IV, University of North Texas System, 2310 North Interstate 35-E, Denton, Texas 76205. The UNT System may in its sole discretion respond in writing to questions concerning this Invitation. Only the UNT System's responses made by formal written addenda to this Invitation shall be binding. Oral or other written interpretations or clarifications shall be without legal effect.

TRD-200806550
Carrie Stoeckert
Assistant Director of Purchasing and Payment Services
University of North Texas System
Filed: December 17, 2008

♦ ♦ ♦

The University of Texas System

Award of Consultant Contract Notification

The University of Texas System Administration ("University"), in accordance with the provisions of Texas Government Code, Chapter 2254, entered into a contract for consulting services ("Contract") with Mercer Human Resource Consulting, Inc. ("Consultant") as more particularly described in the Invitation to Consultants to Provide Offers of Consulting Services ("Invitation"), published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2408).

Project Description:

In accordance with the Invitation and Consultant's response thereto, Consultant shall provide University with executive compensation information as needed. This is an amendment of an existing contract.

Name and Address of Consultant:

Mercer Human Resource Consulting, Inc.

10 South Wicker Drive

Suite 1600

Chicago, Illinois 60606

Total Value of Contract:

Services are only to be provided on an as needed basis. The University does not expect to expend more than $10,000 in any one fiscal year.

Contract Dates:

The Contract was executed by Consultant on October 28, 2008, and by University on December 12, 2008, and dated effective May 1, 2008.

Due Dates for Contract Products:

The consulting services will be completed and delivered to University on an as needed basis.

The term of the Contract expires on December 31, 2009.

TRD-200806531
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: December 16, 2008

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).